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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

THE BOEING COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD
and
BOOSTERS LODGE No. 405,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

Page

The Opinion Below 2

Jurisdiction 2

Question Presented 2

Statutory Provisions Involved 3

Statement Of The Case 4

Reasons For Granting The Writ 8

Conclusion 24

Certificate of Service 25

Appendix

(1) Judgment of the Court of Appeals 1a

(2) Opinion of the Court of Appeals 5a

(3) Decision and Order of the National Labor Relations Board 34a

(4) Trial Examiner's Decision 47a

TABLE OF AUTHORITIES

Afroyim v. Rush, 387 U.S. 253 (1967) 8

Allis-Chalmers Manufacturing Co., 149 NLRB 67 17

Associated Home Builders of Greater East Bay, Inc. v. N.L.R.B., 352 F.2d 745 (9th Cir., 1965) 15

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers v. National Labor Relations Board and The Boeing Company, October Term, 1971; No. 8

The Boy's Markets, Inc. v. Retail Clerks' Union, 398 U.S. 235 (1970) 8, 9

AUTHORITIES (Continued)

Page

International Association of Machinists and Aerospace Workers, Local 504 [Arrow Development Co.,] 185 NLRB No. 22, 75 LRRM 1008 (1970) 10

International Ladies' Garment Workers' Union v. N.L.R.B., 366 U.S. 731 (1961) 12, 17

International Woodworkers of America, 116 NLRB 507 (1956) 15

Leeds and Northrup v. N.L.R.B., 357 F.2d 527, C.A. 3, 1966 20

Local 1255, International Association of Machinists and Aerospace Workers, AFL-CIO v. N.L.R.B., ____ F.2d ____, 79 LRRM 2787 ..... 9, 10

Longshoremen's and Warehousemen's Union, Local 6 (Sunset Line and Twine Company), 79 NLRB 1487 (1948) 15

Longshoremen, ILA, Local 1419, 186 NLRB No. 94, 1970, 75 LRRM 1411 20

N.L.R.B. v. Allis-Chalmers Manufacturing Co., 388 U.S 175 (1967) 8, 9, 10, 11, 15, 23, 24

N.L.R.B. v. Local 50, American Bakery and Confectionery Workers Union, AFL-CIO, 339 F.2d 324, (2nd Cir., 1964) cert. den., 382 U.S. 827 12

N.L.R.B. v. Drivers, Chauffeurs and Helpers Local Union No. 639, 362 U.S. 274 (1960) 13

N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029, 446 F. 2d 369, C.A. 1, 1971 9

AUTHORITIES (Continued)

Page

N.L.R.B. v. Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO, October Term, 1971, No. 71-711 ..... 9, 24

David O'Reilly v. N.L.R.B., No. 26,892 10

Perez v. Brownell, 356 U.S. 44 (1958) 8

Radio Officers' Union v. N.L.R.B., 347 U.S. 17, (1954) 12, 15

Scofield v. N.L.R.B., 394 U.S. 423 (1970) 22, 23

Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) .. 8

UNITED STATES STATUTES:

28 U.S.C. Section 1254 (1) 2

29 U.S.C. Section 157 ..... 3, 11

29 U.S.C. Section 158(a)(1)-(5) 12

29 U.S.C. Section 158 (a)(3) 16

29 U.S.C. Section 158(b)(1) 3

29 U.S.C. Section 158 (b)(1)(A) 2, 6, 7, 11, 13

29 U.S.C. Section 158(b)(2) 16

29 U.S.C. Section 160(f) 7

OTHER AUTHORITIES

Cox, Some Aspects of the Labor-Management Relations Act, 1947, 61 Harv. L. Rev. 1, 44 (1967) .. 12

Marcus, The Right of A Union To Fine A Member Who Works During A Strike, 15 La. Bar Journal 323 (1968) 9

Owen, Fidelity, Fines and Fair Practice, 18 Labor Law Journal 707 (1967) 9

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BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

The petitioner, The Boeing Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 14, 1972, enforcing an order of the National Labor Relations Board dated August 27, 1970, and remanding the case in part to the Board for further consideration in accordance with the Court's opinion.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit was rendered on February 3, 1972. The said opinion is reported at 79 LRRM 2443 (*infra*, page 5a et seq.). The Board's decision and order (*infra*, pages 34a through 46a) is reported at 182 NLRB No. 23. The Trial Examiner's decision and recommended order is reproduced herein (*infra*, pages 47a through 114a).

JURISDICTION

The Judgment of the Court of Appeals for the District of Columbia Circuit (*infra*, page 1a) was entered on March 14, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a union committed an unfair labor practice under Section 8(b)(1)(A) of the National Labor Relations Act and engaged in conduct to "restrain or coerce" employees in the exercise of their rights under Section 7 of the Act to "refrain from" concerted activities, where such union imposed fines on, and attempted to collect such fines from, employees who came through the Union's picket lines, regardless of whether or not such employees had resigned their union membership and regardless of whether or not the fines

related to the period before, or the period after, resignation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 157. Right of employees as to organization collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

Section 158. Unfair labor practices.

(b) It shall be unfair labor practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title; *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or re-

tention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter sometimes referred to as the Union) and The Boeing Company (hereinafter sometimes referred to as the Company) were parties to a collective bargaining agreement which expired on September 15, 1965. Upon the expiration of the contract, the Union commenced a lawful strike against Boeing and began picketing at its Michoud plant in Orleans Parish, Louisiana as well as at various other locations. This work stoppage lasted 18 days. On October 2, 1965, a new bargaining agreement was signed and the strikers returned to work the following day (*infra*, pages 6a-7a; 35a).

Both the expired agreement and the newly executed agreement contained maintenance of membership clauses, which required all new employees to notify both the Union and the Company within 40 days of their employment if they elected not to become members of the Union. It also required that those who became Union members retain their membership during the contract term (*infra*, pages 7a; 35a).

During the strike period, approximately 143 out of approximately 1900 production and maintenance employees then represented by the Union at the Michoud plant, crossed the picket line and reported to

work. All of these persons had been members of the Union during the 1963-65 contract period. Some of the employees who worked during the strike made no attempt to resign from the Union during the strike. The remaining 119 submitted their voluntary resignations, in writing, to both the Union and the Company. About 61 employees who resigned did so *before* they crossed the picket line and returned to work. Another 58 also resigned during the course of the strike, but *after* they had returned to work. However, all resignations were submitted after the expiration of the 1963-65 contract, and before the execution of the new agreement, and all were submitted prior to the imposition of any Union disciplinary action, or any threats or warnings of same. Union members were not warned prior to the strike that disciplinary measures could, or would, be taken against those who crossed the picket line to work nor had any such discipline been imposed on members by Booster Lodge 405 prior to that time (*infra*, pages 7a-8a).

In late October or early November of 1965, the Union notified all members and former members who had crossed the picket line to work during the strike that charges had been preferred against them under the International Union Constitution for "Improper Conduct of a Member" due to their having "accept[ed] employment ... in an establishment where a strike exist[ed]." They were advised of the dates of their Union trials, which were to be held even in their absence if they did not appear, and they were notified of their right to be represented by counsel, *provided* the said counsel was a member of the International Association of Machinists and Aerospace Workers. Un-

der the provisions of the national Union Constitution which permitted the imposition of disciplinary measures, including "reprimand, fines, suspension, or expulsion from membership, or any lesser penalty or combination," where a member had been found guilty of misconduct after notice and a hearing, fines were imposed on *all* employees who had worked during the strike. No distinction was drawn between those employees who had resigned from the Union before returning to work, after returning to work, and those who had remained members (*infra*, page 8a).

Employees who did not appear for trial before the Union Trial Committee and those who did appear and were found guilty were fined $450.00 each, and they were barred from holding a Union office for a period of five years. The fines of about 35 employees who appeared for trial, apologized and pledged loyalty to the Union, were reduced to 50 percent of the earnings they received during the strike. The Union has sent out written notices to the fined employees that the matter has been referred to an attorney for collection, that suit will be filed if the fines remain unpaid, and that reduced fines will be reinstated to $450.00 in the event of nonpayment. The Union has filed suit against at least nine individual employees to collect the fines (plus attorney's fees and interest). (*Infra*, pages 8a-9a).

On February 18, 1966, the Company filed a charge with the National Labor Relations Board alleging that the Union had violated Section 8(b)(1)(A) of the National Labor Relations Act,[1] and a complaint was is-

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[1] 29 U.S.C. Section 158 (b)(1)(A).

sued by the Board's General Counsel. The Labor Board decided that the Union violated Section 8(b)(1)(A): (1) by fining those employees who had resigned from the Union before they returned to work during the strike; and (2) by disciplining those employees who had resigned after returning to work, to the extent that the fines were imposed for their working during the strike after their resignations (*infra*, pages 9a-10a). The Labor Board further found that the Union did *not* violate the Act: (1) by fining members for crossing the picket line to work during the strike who did not resign from the Union; and (2) by fining those employees who had resigned after returning to work during the strike, for work they performed during the strike prior to their designations (*infra* page 10a).

Both the Union and The Boeing Company filed petitions to review the Board's decision and order with the Court of Appeals for the District of Columbia Circuit pursuant to 29 U.S.C. Section 160(f). The Court of Appeals sustained the foregoing findings of the Board (*infra*, pages 5a and 10a). However, the Board had also held that the legality of union fines does not depend on their reasonableness, and it did not adopt the Trial Examiner's findings, conclusions and recommendations on that issue (*infra*, at page 42a, footnote 16).[2] The Court of Appeals disagreed with the Board in this respect, and remanded the case for further proceedings in conformity with its views as set out in its opinion (*infra*, pages 22a-30a; 33a). The Court below also refused to overrule, reconsider or deviate from the holding in *N.L.R.B. v. Allis-Chalmers*

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[2]One member dissented in this regard.

Manufacturing Co., 388 U.S. 175 (1967), regarding union fines of members who cross picket lines and return to work during a strike (*infra*, page 13a), footnote 7).

The Union has filed a Petition for Writ of Certiorari. *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. National Labor Relations Board and The Boeing Company*, October Term, 1971, No. 71-1417.

REASONS FOR GRANTING THE WRIT

THERE ARE COMPELLING REASONS FOR RE-EXAMINATION AND CLARIFICATION OF THE COURT'S PRIOR RULING WITH RESPECT TO UNION FINES OF MEMBERS WHO RETURN TO WORK DURING A STRIKE. *(N.L.R.B. v. Allis Chalmers Manufacturing Co. supra)*

On a number of occasions the Court has found it necessary or desirable to reconsider or re-examine its earlier decisions. For instance, in *Afroyim v. Rusk*, 387 U.S. 253 (1967) the Court granted certiorari to reconsider its holding in *Perez v. Brownell*, 356 U.S. 44 (1958), noting that *Perez* was decided almost 10 years previously by a 5 to 4 vote, and had been a source of controversy and confusion ever since. More recently, and in the field of labor relations law, the Court granted certiorari in *The Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970), and concluded that *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), decided 8 years earlier and relating to the jurisdiction of federal district courts to enjoin a strike in breach of a no-strike obligation under a collective

bargaining agreement, was erroneously decided, and overruled that decision.

As in *The Boy's Markets, Inc. v. Retail Clerk's Union, supra,* the Court below felt it was bound by the decision of this Court in *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967) (*infra*, page 13a). The Court's 5-4 opinion in *Allis-Chalmers* has received critical comments.[3] In the opinion of the Court below, it specifically declined to follow the decision in *N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029*, 446 F.2d 369, C.A. 1, 1971 (*infra*, page 19a, footnote 19), a decision with regard to which this Court granted certiorari (October Term, 1971, No. 71-711. 40 U.S.L.W. 3455). Thereafter, in *Local 1255, International Association of Machinists and Aerospace Workers, AFL-CIO v. N.L.R.B.*, ____ F.2d ____, 79 LRRM 2787, (No. 71-1578; March 15, 1972) C.A. 5, 1972, that Court stated (in footnote 1, with reference to the instant case):

> To the extent that *Boeing* may be read to support the Board's position that all forms of discipline for postresignation picket-line-crossing are barred by the Act, we respectfully decline to follow it.

In the same opinion, the Court of Appeals for the Fifth Circuit held that a union member who resigns *during*

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[3]See, *e.g.*, Marcus, *The Right Of A Union To Fine A Member Who Works During A Strike*, 15 La. Bar Journal 323 (1968); Owen, *Fidelity, Fines and Fair Practices*, 18 Labor Law Journal 707 (1967).

a strike and crosses his union's picket line to return to work may be fined by the union for his *postresignation* strikebreaking when the fine is enforceable *only* by expulsion from the union, a holding contrary to that of the Court below in the instant case.

Further reason for reconsideration of *Allis-Chalmers* or of clarification of same appears in the following language of the opinion of the Court of Appeals for the Fifth Circuit in *Local 1255, I.A.M. & A.W. v. N.L.R.B., supra:*

> Section 7 grants employees the right to refrain from concerted union activities except in circumstances not relevant here. Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their Section 7 rights. *It would thus seem at first glance that an employee-union member is free to eschew participation in strikes without fear of union discipline.* This is, however, not the law. (Emphasis supplied.)

Also, as noted in the opinion of the Court below, a companion case to the instant one, *International Association of Machinists and Aerospace Workers, Local 504* [*Arrow Development Co.*], 185 NLRB No. 22, 75 LRRM 1008 (1970), is on appeal and pending before the Ninth Circuit Court of Appeals, *sub. nom. David O'Reilly v. N.L.R.B.*, No. 26, 892 (*infra*, page 22a, footnote 25)

In its decision in the instant case the Board acknowledged it has long recognized "that a fine is inherently coercive." Yet, relying upon *Allis-Chalmers, supra,* the Board concluded that Section 8(b)(1)(A) was not intended to reach the conduct of a labor organization in enforcing and imposing a fine upon its *members* for crossing an authorized picket line (*infra,* page 38a). The National Labor Relations Act is the cornerstone of existing federal labor policy, and regulates the relationships between employers, employees and labor organizations. The core of the Act is in its protection of *employee* rights. To this end, Section 7 of the Act both insures employees a right of collective action while at the same time preserving their individual right to refrain from collective activities.[4] Having granted to employees these dual rights of collective and individual action, Congress in Section 8(b)(1)(A) of the Act,[5] established a compromise between the need for cohesion in concerted activity and the freedom of members of a union to avoid participation in that action. The precise balance struck in Section 8(b)(1)(A) and the right of individual employees to refrain from collective action guaranteed in Section 7, and to the extent to which, through disciplinary action, a union may infringe upon or eliminate that right for its own purposes, is the subject matter of this case.

The right to refrain from concerted activity contained in Section 7, and the provisions of Section 8(b) of the Act, were added by the Taft-Hartley Act of 1947.

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[4] 29 U.S.C. Section 157.
[5] 29 U.S.C. Section 158(b)(1)(A).

The Act, in former Section 7 and Section 8(a), had protected employees' collective activities by forbidding *employers* from interfering with, restraining, or coercing employees in the exercise of their statutory rights, or discriminating against employees because of their protected concerted activity. Impressed and concerned with the growing strength of labor unions, the Congress sought to strike "a new balance ... by imposing corresponding obligations on labor organizations. The Government, instead of aiding one side, now [stood] in the center."[6] The Court found, in Section 8(b), a parallel to Section 8(a),[7] placing labor organizations on the same restricted grounds as employers regarding employees' rights.[8]

Indeed, an employer may not impose economic sanctions or other disciplinary action upon employees who elect to engage in a lawful strike or other protected concerted activities. With the decision of the Congress to place unions and employers in similar positions respecting the rights of employees came a shift in emphasis in interpreting the Act, from protection of *union* activities to protection of *employee* rights. As the Supreme Court noted in 1954, the "policy of the Act is to insulate employees' jobs from their organizational rights."[9] This view of the Act implies the distinction

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[6] Cox, *Some Aspects of the Labor-Management Relations Act*, 1947, 61 Harv. L. Rev. 1, 44 (1967).

[7] 29 U.S.C. Section 158(a)(1)-(5).

[8] *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 738 (1961).

[9] *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954). See also, *N.L.R.B. v. Local 50, American Bakery and Confectionery Workers Union, AFL-CIO*, 339 F.2d 324, 328 (2nd Cir., 1964) cert. den., 382 U.S. 827.

which has been central to the interpretation of Sections 7 and 8(b) (1)(A): an individual's status as an employee is separate and apart from his status as a union member. This distinction is inherent in the proviso to Section 8(b)(1)(A), which expressly exempts from the prohibition of the section union action against employees relating specifically to their status as union members.[10] The general interpretative problem of Sections 7 and 8(b)(1)(A), which is central to the issues in this case, is the conflict between a labor organization's control of its members compared with the prohibition of union infringement of employee rights. Thus, the instant case is crucial to the continuing development of policy guidelines delineating the scope of union power over its members where the exercise of that power infringes upon the employees' Section 7 rights.

The Court in *N.L.R.B. v. Drivers, Chauffeurs and Helpers Local Union No. 639*[11] found that "the central theme" of the congressional debate surrounding the adoption of the amendments embodying Sections 7 and 8(b) was "the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal."[12] Differentiating fair union conduct from foul, the Court quoted Senator Taft, the sponsor of Section 8(b), for the congressional purpose and scope of the new section:

> The effect of the pending amendment is that the Board may call the union before them, ex-

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[10] 29 U.S.C. Section 158(b)(1)(A).
[11] 362 U.S. 274 (1960).
[12] 362 U.S. 274, 287.

> actly as it has called the employer, and say, 'Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn.' The Board may say, 'You can persuade them; you can put up signs, you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force *or threat of economic reprisal*, prevent them from exercising their right to work.'[13]

The passages quoted by the Court make clear that the Congress intended in Section 8(b)(1)(A) to restrict union action "tinged with violence, duress or reprisal"[14] even where the union was exercising its ultimate economic weapon, the strike. It is indisputable that even in the fact of a direct challenge to its solidarity, a union may not employ certain forbidden means to obtain from dissenting members obedience to the wishes of its leadership or even a vote of the majority. Indeed, in its interpretation of Section 8(b)(1)(A), the Board has found that even the "interposi-

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[13]Cong. Rec. 4436, quoted in 362 U.S. 274, 287-288. The Court further quoted Senator Taft:

> [The new Section] would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. *All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.* Ibid., page 288. (Emphasis added.)

[14]362 U.S. 274, 286.

tion of passive force to prevent employees from going to work is ... a form of restraint proscribed by [the Section]."[15] Controlling the Board's decisions has been its consistent view that "the interdependent guarantees of Section 8(b)(1)(A) and Section 7 of the Act include the protected right of employees to work in the fact of a strike."[16]

It should be obvious that economic sanctions in the form of fines can have just as adverse an effect on "the protected right of employees to work in the fact of a strike" as does intimidation or mass picketing. Congress clearly intended that Section 8(b)(1)(A) encompass the use or threat of economic reprisal along with other forms of coercion, outwardly more violent.[17]

In *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954), the Court held that the "policy of the Act is to insulate employees' jobs from their organizational rights," citing Section 7 of the Act. By its decision in *Allis-Chalmers*, the Court has refuted such a policy,

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[15] *Longshoremen's and Warehousemen's Union, Local 6 (Sunset Line and Twine Company)*, 79 NLRB 1487, 1506 (1948).

[16] *International Woodworkers of America*, 116 NLRB 507, 508 (1956). The Board was careful to emphasize that it spoke not merely of employees uninvolved in union activity, but specifically about "*striking employees*" subject to coercion "in the exercise of their right to abandon the strike and return to work." *Ibid.* (Emphasis in original.)

[17] See footnote 13, *supra; Associated Home Builders of Greater East Bay, Inc. v. N.L.R.B.*, 352 F.2d 745, 748 (9th Cir., 1965) ("this Action was directed against the use of physical force or threats of force or of economic reprisal," quoting *Drivers Local Union;* Cox, *supra*, footnote 6, at 32-33; Note 115 U. PA, L. Rev. 47, 54-55 (1966).

for the threat of any fine, whether "reasonable" or "unreasonable," certainly restrains or coerces an employee who desires to work, and thus affects his job and earning capacity. Moreover, the decision in effect finds that through membership in a union an employee is deprived of some of the rights guaranteed to him in Section 7 of the Act; i.e., "the right to refrain from any and all such activities." The decision further ushers in the possibility that court-enforced fines could result in violations of Section 8(b)(2) of the Act [29 U.S.C. 158(b)(2)].[18] If a union institutes garnishment proceedings which could or would lead to the lawful discharge of the employee because of an employer's valid no-garnishment rule, a union would cause an employer "to discriminate against an employee with respect to whom membership in such organization has been ... terminated on some ground other than his failure to tender the periodic dues and the initiation fees . . ."[19] The resultant violation in such circumstances receives support from the Board's decision in *Pulp & Paper Workers*, 170 NLRB No. 8, 67 LRRM 1605, 1606 (1968) wherein the Trial Examiner's Decision was adopted by the Board, and the Trial Examiner stated:

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[18]Section 8(b)(2) [29 U.S.C. Section 158(b)(2)] provides:

> It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

[19]Section 8(a)(3) of the Act; 29 USC Section 158(a)(3).

> Thus, the assessment of a fine can never be regarded as a diminished version of a penalty expressly permitted by statute but as something additional, and where, as here, *it is used in a manner to affect the employment status of the employees, it is proscribed by law.* (Emphasis supplied.)

It would further appear that the language of the proviso to Section 8(b)(1)(A), which permits unions to prescribe their own membership rules, impliedly means that expulsion from union membership is the sole lawful method by which a union may enforce collection of fines. Physical coercion is not a necessary prerequisite to a violation of Section 8(b)(1)(A). See, *e.g., International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731 (1961), where it was held it is unlawful for a union to act as exclusive bargaining representative when it did not represent a majority of the employees in the bargaining unit.

The dissenting Board member in *Allis-Chalmers* accurately observed:

> ... the majority revert again to the reasoning of the Wisconsin Motor case and find no violation because, in their view, the fined individuals are affected only in their status as members and not employees. *I think it will come as a surprise to the affected individual when he is told a union fine designed to induce him to respect picket lines and stay away from his job does not touch him as an employee,* but only

as a union member. 149 NLRB 67, 73 (1964). (Emphasis supplied.)

It has been suggested that should the Court adhere to its decision in Allis-Chalmers, the effect will be to encourage strikes by unions because, knowing that they have power to exert economic coercion against members who may desire to work, they will be less reluctant to take strike action, and employers, with the knowledge that unions can hit employees in the pocketbook where it hurts most, will be less likely to operate during a strike.[20]

It is further submitted that the question of the legality of court-enforced fines under Section 8(b)(1)(A) may not be viewed in a vacuum, but all the facts and circumstances surrounding the imposition and the collection of the fines should be considered. In the instant case, neither before nor during the strike did the Union warn employees that fines or any other action would be taken against those who worked during the strike (*infra*, pages 7a-8a). Although employees were notified that they could be represented at the "trial" by an attorney, provided that the attorney be "a member of the International Association of Machinists and Aerospace Workers," trials were held even if the employee did not appear (*infra*, page 8a). There is no evidence that anyone was found not guilty (*infra*, page 53a), at footnote 2). The sum of $450.00 was arbitrarily determined to be the amount of the fine to be imposed. Although a representative of the Union testified that some of the fines were reduced to 50% of the employ-

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[20]See footnote 3, *supra*.

ee's earnings during the strike, there was no notification to employees by the Union that it had reduced or would reduce the fines under some circumstances. The notification to the employees of the charges against them did not advise them of the penalties which might be imposed upon them. *Ibid.*

The record discloses that the suits filed by the Union were for $630.00 "with legal interest." The figure of $630.00 was based upon $450.00 for the fine, plus $180.00 attorney's fees (*infra*, page 55a).

The fines were imposed upon employees without regard to whether or not they had resigned from the Union. It was the position of the Union that under its Constitution members could not resign, except "by death" (*infra*, page 62a; 40a at footnote 11; 72a).

Fines had never been levied on members of the Union before for any reason. Although the Union's Constitution provides that "accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" shall warrant various penalties, it is clear that these provisions had not been effectively communicated to the employees (*infra*, pages 99a; 51a-53a).

A request was made to the Company by the Union that certain of the fined employees be discharged, and it waited until January 8, 1968, to withdraw the request.

The Union's Business Representative, Mr. Higgins, suggested in his testimony that there was a possibility that an employee made more than $450.00 working during the strike. The wage rates ranged from $2.38 to $3.63 per hour. Based on a forty-hour week, therefore, employees would have grossed from $95.20 to $145.20 per week. The strike was of 19 days duration.[21] Treating the duration of the strike as three weeks (at 40 hours per week), the most the highest-paid employee would have grossed would have been $435.60. The amount of $630.00 plus interest is at least $200.00 in excess of the $435.00 the highest-rated employee would have grossed. To be required to pay amounts exceeding their earnings clearly coerces and restrains employees in their rights to restrain from concerted activities. Cf. *Leeds and Northrup v. N.L.R.B.*, 357 F.2d 527, 536, C.A. 3, 1966. See also, *Longshoremen, ILA, Local 1419*, NLRB, 1970, 75 LRRM 1411. Also to be considered is the time lost from work in defense of the civil court action and the employee's attorney's fees and court costs.

The amount of the fines was arbitrarily determined and imposed. The amount of $450.00 was determined before any of the hearings or trials were held, and once the employees were adjudged guilty they were uniformly and unwaveringly informed that their fine was $450. No consideration was given to individual circumstances, such as the employee's hourly rate, or whether or not he knew he was in violation of the Union's rules (*infra* pages 74a-75a).

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[21]These are total calendar days, and not just work days.

The imposition of the fines and the filing of the civil court actions are made more illegal by virtue of the atmosphere in which these actions were taken. For instance, on October 13, 1965, the Union published and issued to all employees its house organ, "The Space Traveler." Charging Party Exh. No. 1. In that publication, the Union stated that its mailing list is accurate and up-to-date for Union members only, and instructed the members to "pass your paper on to 'someone listed' and 'you know who,' so that they will know that WE KNOW." The reference to "someone listed" is to pages 3 and 4 of the publication, where there are two pages of names of employees who allegedly "crossed the picket line and/or wrote letters of termination of their membership" during the strike. The names appear under the following heading:

WE SHALL NOT FORGET ! ! !

Also on page one, over the signature of the aforementioned Mr. Higgins, the employees are told:

> THE 10% WHO WORKED BEHIND THE LINES, COMMONLY CALLED SCABS, MUST HAVE A GUILTY CONSCIENCE TO ACCEPT THE GAINS WON BY OTHERS.

Another matter which should be considered is the fact that employees in the New Orleans area had been subjected to the devastating effects of Hurricane Betsy a week before the strike began.[22] Considering the personal losses of employees and their families, it could

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[22]Hurricane Betsy struck on September 9, 1965.

well be expected that some of them would wish to exercise their legal right to their gainful employment during the strike. The Trial Examiner discredited Business Representative Higgins' claim that the Union did take the hurricane situation into consideration regarding the fines (e.g., *infra*, pages 54a; 56a-57a).

It is submitted that all of these factors should be considered in determining whether or not the imposition of the fines violated the Act.

The Board and the Court below correctly found that the Union violated the Act by imposing fines upon its former members who had resigned. However, the Board and the Court below erroneously concluded that the Union's imposition of fines upon those members who did not resign was legal. In this respect, the Board did not take into consideration the uncontested fact that the Union's Constitution and By-laws contain no provisions permitting its members to resign. In fact, it was the Union's position that its members *cannot* resign from it (*infra*, page 40a, at footnote 11); (*infra* at pages 61a-62a).

As noted by the Board (Appendix C; *infra*, page 41a) the Court in *Scofield v. N.L.R.B.*, 394 U.S. 423 (1970) expressly sanctioned the strategy of leaving the union to avoid discipline. Although the Board rejected the Union's position that voluntary resignation is impossible of achievement, the fact remains that the Union takes that position. Since the Union has maintained that position all along, it is reasonable to conclude that at least some of the employees were informed they could *not* resign. Certainly the Union did not tell them

that they *could* resign. It is also reasonable to conclude that some or all of those employees who crossed the picket line and worked but did not resign from the Union did not resign because they were told they could not do so or were not aware that they could do so.[23]

The Union contends that its members are to be held to be aware of the provisions of the Constitution regarding picket lines and disciplinary actions. Conversely, then, it may be argued that, for the same reasons, the employees were also aware that the Constitution does not provide for resignations, and of the Union's position that they could not do so.

It is submitted that if the fines are otherwise legal, they are illegal where, as here, the Union's Constitution does not provide for resignations from membership and the Union takes the position that its members cannot resign. The fact that the Union's position has been held to be erroneous, as a matter of law, is of no consequence. To hold otherwise is contrary to the Court's view that employees may resign and leave the union to avoid disciplinary action. *Scofield v. N.L.R.B.*, *supra*, 394 U.S. at 435 (1969).

Another factor which distinguishes the instant case from *Allis-Chalmers* and *Scofield* is that in both of those cases employees were warned in advance that they might be or would be fined, and the possible extent of and the size of the fine was indicated. More-

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[23]Certainly the employees cannot be held to have known that almost five years later the Board would reject the Union's position that its members may not resign.

over, in the instant case, the Union had never previously imposed a fine on any of its members. Under all of the circumstances of the instant case, the "contract" theory is inapplicable, and it cannot be logically concluded that the employees "consented" to the disciplinary action.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia, to the extent requested herein. Although the Court granted certiorari to consider the postresignation issue in *N.L.R.B. v. Granite State Joint Board, supra,* the facts of that case do not lend themselves to the proper resolution of the issues presented here. In fact, no party in the *Granite State* case is urging the Court to reconsider its decision in *N.L.R.B. v. Allis-Chalmers Mfg. Co., supra,* nor is the question of the duty and the authority of Board to determine the reasonableness of fines presented in the *Granite State* case.

RESPECTFULLY SUBMITTED,

FREDERICK A. KULLMAN
SAMUEL LANG
C. DALE STOUT
KULLMAN, LANG,
INMAN & BEE
POST OFFICE BOX 60118
NEW ORLEANS, LOUISIANA
ATTORNEYS FOR
PETITIONER

MAY, 1972

CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33 of the Supreme Court Rules, I certify that I have caused a copy of the foregoing Petition For Writ of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit to be served on the following persons by mailing three copies of same via air mail, postage prepaid:

Solicitor General,
Department of Justice,
Washington, D. C. 20530

Bernard Dunau, Esq.
912 duPont Circle Building N.W.
Washington, D. C. 20036
Attorney for Booster Lodge No. 405,
International Association of Machinists
and Aerospace Workers, AFL-CIO

Norton J. Comé, Esq.
National Labor Relations Board
1717 Pennsylvania Avenue N. W.
Washington, D. C. 20570

this day of May, 1972.

SAMUEL LANG
Counsel for Respondent,
The Boeing Company

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24687

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

THE BOEING COMPANY, *Intervenor.*

No. 24744

THE BOEING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Intervenor.*

Judgment

Filed March 14, 1972

Before: MacKinnon and Wilkey, Circuit Judges and Gourley,* Senior District Judge for the Western District of Pennsylvania.

The above consolidated causes came on to be heard upon petitions to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated August 27, 1970, against Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and as-

* Sitting by designation pursuant to 28 U.S.C. § 294 (d) (1970).

signs. On February 3, 1972, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's order in part and remanding the case in part to the Board for further consideration in accordance with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors and, assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees, who had resigned from and who were no longer members of Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines against such employees because of their post-resignation conduct in working at the Michoud plant during the September 1965, strike, or by threatening to seek or seeking court enforcement of such fines.

(b) In any like or related manner, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this Judgment, who have paid fines under the circumstances described in that paragraph, the amount of said fines imposed because of post-resignation conduct in working at the plant.

(b) Post at its office and meeting hall and at the Michoud, Louisiana plant of the Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix." Copies of said notice, on forms provided by the Regional

Director for Region 15, (New Orleans, Louisiana), after being signed by an authorized representative, shall be posted at the aforementioned locations, in conspicious places, including all places where notices to employees are customarily posted, and reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Judgment, what steps Union Petitioner has taken to comply herewith.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the case be and it is hereby remanded in part to the Board for further consideration in accordance with the Court's opinion.

GEORGE E. MACKINNON
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

MALCOLM R. WILKEY.
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

WALLACE S. GOURLEY
Senior District Judge, for the Western District of Pennsylvania

APPENDIX

NOTICE TO MEMBERS

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT restrain or coerce employees who had resigned from the Union and who, in the exercise of their rights guaranteed in Section 7 of the Act, worked at the Michoud plant during the September 1965 strike, by imposing fines or by threatening to seek or by seeking court enforcement of said fines as to such employees.

WE WILL reimburse nonmembers abovementioned for any fines they may have paid to us for working during the said strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed to them in Section 7 of the National Labor Relations Act.

BOOSTER LODGE No. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, T6024 Federal Building (Loyola) 701 Loyola Ave., New Orleans, La. 70113 Telephone 504-527-6361.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,687

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
THE BOEING COMPANY, INTERVENOR

No. 24,744

THE BOEING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERVENOR

Petitioners for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

Decided February 3, 1972

Mr. Bernard Dunau, with whom *Messrs. Plato E. Papps* and *C. Paul Barker* were on the brief, for petitioner in No. 24,687 and intervenor in No. 24,744.

Mr. C. Dale Stout for petitioner in No. 24,744 and intervenor in No. 24,687.

Mr. Glen M. Bendixsen, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman*, General Counsel at the time the brief was filed, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Stanley R. Zirkin*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before MacKinnon and Wilkey, *Circuit Judges*, and Gourley,* *Senior District Judge* for the Western District of Pennsylvania.

MacKinnon, *Circuit Judge:* In this case, we are called upon to examine the right of a labor organization, consonant with the provisions of the National Labor Relations Act (N.L.R.A.), to discipline those members who have crossed its picket line to work during an authorized strike. We must determine the effect which a member's resignation from the union, before, during, or after such conduct, has upon the union's disciplinary authority. We are also requested to consider the legal implications of the "reasonableness" of the fines imposed, where the union has threatened enforcement thereof, or has actually sought collection through legal means.

The essential facts are not in dispute. Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter sometimes referred to as the Union), and The Boeing Company, (hereinafter sometimes referred to as the Company), were parties to a collective bargaining agreement which was effective from May 16, 1963, through September 15, 1965.[1] Upon the expiration of the contract, the Union commenced a lawful strike against Boeing at its Michoud plant, as well as at various other locations. This work stoppage lasted 18

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] At the time of the execution of the 1963-1965 agreement, Booster Lodge No. 405 was not yet in existence. Boeing's Michoud, Louisiana plant, with which we are concerned in this case, was considered to be a "remote location" unit, identified with the "primary location" unit at Seattle-Renton, Washington. Therefore, the production and maintenance employees in the Michoud unit were represented by Aeronautical Industrial Lodge No. 751, I.A.M., AFL-CIO, of Seattle, a signatory to the above-mentioned contract with Boeing. Booster Lodge No. 405 came into existence sometime later in 1963, with jurisdiction over the Michoud plant, but the bargaining agreement was not modified to reflect this occurrence.

days. On October 2, 1965, a new bargaining agreement was signed, and the economic strikers returned to work the following day. Both the expired agreement and the newly executed contract contained maintenance-of-membership clauses, which required all new employees to notify both the Union and the Company within 40 days of their acceptance of employment if they elected not to become Union members. It also required those who were Union members to retain their membership during the contract term.

During the strike period, approximately 143 employees, of tht 1900 production and maintenance employees represented by the Union at the Michoud plant, crossed the picket line and reported to work. All of these persons had been Union members during the 1963-1965 contract period. Some of the employees who worked during the strike made no attempt to resign from the Union during the strike. The remaining 119 submitted their voluntary resignations, in writing, to both the Union[2] and the Company. About 61 of the employees who resigned did so *before* they crossed the picket line and returned to work. Another 58 resigned during the course of the strike, but *after* they had crossed the picket line in order to work. All resignations were submitted after the expiration of the 1963-1965 contract, and before the execution of the new agreement, and all were submitted prior to the imposition of any Union discipline. Union members had not been warned prior to the strike that disciplinary measures could, or would, be taken against those who crossed the picket line to work, nor had any such

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[2] The Union objected below to the fact that notices of resignation were sent to District Lodge 751, rather than to Booster Lodge 405. However, since Booster Lodge 405 was not a party to the original 1963-1965 agreement, as explained in footnote 1, *supra*, it is clear that the employees who notified District Lodge 751 were attempting to comply with the applicable contractual requirements. Furthermore, District Lodge 751 notified Booster Lodge 405 of all resignations it received. We thus see no validity in the objection.

discipline been imposed on members by Booster Lodge 405 prior to this time.

In late October or early November of 1965, the Union notified all members and former members who had crossed the picket line to work during the strike that charges had been preferred against them under the International Union Constitution, for "Improper Conduct of a Member" due to their having "accept[ed] employment . . . in an establishment where a strike exist[ed]." They were advised of the dates of their Union trials, which were to be held even in their absence if they did not appear, and they were notified of their right to be represented by any counsel who was a member of the International Association of Machinists and Aerospace Workers. Pursuant to the International Union Constitution provision which permitted the imposition of disciplinary measures, including "reprimand, fine, suspension, or expulsion from membership, or any lesser penalty or combination," where a member had been found guilty of misconduct after notice and a hearing, fines were imposed on all employees who had worked during the strike. No distinction was drawn between those persons who had resigned from the Union during the course of the strike and those who had remained Union members.

Employees who did not appear for trial before the Union Trial Committee and those who appeared but were found guilty were fined $450.00 each, the amount determined by the membership, and they were barred from holding a Union office for a period of 5 years. The fines of about 35 employees who appeared for trial, apologized, and pledged loyalty to the Union, were reduced to 50 percent of the earnings they received during the strike.[3] In some of

[3] Employees who worked during the strike earned between $2.38 and $3.63 per hour, or between $95 and $145 per 40-hour week. In some instances, earnings during the strike period were supplemented by the inclusion of bonus or premium rates for weekend and overtime work.

these cases the time period during which these persons were prohibited from holding Union office was decreased to a period based upon the number of days of strikebreaking activity each respective person had engaged in. None of the disciplined individuals processed intra-Union appeals.

Although none of the $450.00 fines has been paid, reduced fines have been paid in some instances. The Union has sent out written notices that the matter has been referred to an attorney for collection, that suit will be filed if the fines remain unpaid, and that reduced fines will be reinstated to $450.00 in the event of nonpayment. The Union has also filed suit against nine individual employees to collect the fines (plus attorney's fees and interest). None of these suits has yet been resolved.

On February 18, 1966, the Company filed a charge with the N.L.R.B., alleging that the Union had violated Section 8(b)(1)(A) of the N.L.R.A.[4], and a complaint was issued by

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[4] 29 U.S.C. § 158(b)(1)(A) (1970), which provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

29 U.S.C. § 157 (1970) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

the General Counsel. The Labor Board decided that the Union violated section 8(b)(1)(A): (1) by fining those employees who had resigned from the Union before they returned to work during the strike; and (2) by disciplining those employees who had resigned after returning to work, to the extent that the fines were imposed for their working during the strike after their resignations. The Board further found that the Union did *not* violate the Act (3) by fining members for crossing the picket line to work, and by fining those employees who had resigned after returning to work during the strike, for work they performed during the strike prior to their resignations.

Finally, the Board determined (4) that it was not the intention of Congress to have the N.L.R.B. regulate the size of such disciplinary fines and establish standards with respect to their reasonableness, and it dismissed the claim that otherwise legal fines may be rendered violative of the N.L.R.A. if unreasonably large. A cease and desist order was issued, and the Union was ordered to refund any fines collected from employees who had resigned before returning to work. The Union was also required to refund a pro rata portion of those fines collected from employees who had resigned after first engaging in work during the strike, so that the part of the fines retained would only reflect pre-resignation conduct.

Booster Lodge 405 challenges the Board's conclusion that a mid-strike resignation from a union relieves an individual from the burden of union discipline with respect to his post-resignation activity, while The Boeing Company contends that the N.L.R.B. should have examined the reasonableness of the fines imposed by the Union. The Board seeks enforcement of its order.

Part I of this opinon discusses the legality of the imposition of the disciplinary fines by the Union in response to the strikebreaking by the approximately 143 employees in-

volved. Part II considers the effect the reasonableness of the fines has upon their propriety under the N.L.R.A., and the proper function of the N.L.R.B. in this area. Finally, Part III deals with the propriety of the Board's remedial order.

I

The Legality of the Disciplinary Fines

A. *The Employees Who Did Not Resign*

As early as 1954, in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954), the Labor Board held that a union did not violate Section 8(b)(1)(A) of the Act by imposing a fine on a member for his failure to perform picket duty during the course of an authorized strike. The Board declared that the *proviso* to 8(b)(1)(A)[5] precluded any interference by it with the internal affairs of a labor organization in such a situation. In *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), a divided Supreme Court similarly determined that a union did not violate the N.L.R.A. when it imposed, and attempted to enforce through court action, reasonable fines against members for their failure to honor an authorized picket line. Instead of relying upon the express language of the *proviso*, however, the Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against "restraint" or "coercion." See 388 U.S. at 183-195.[6] The Court noted:

> National labor policy has been built on the premise that by pooling their economic strength and acting

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[5] *See* n. 4, *supra*.

[6] For another good analysis of the legislative history of § 8(b)(1)(A), *see National Maritime Union*, 78 NLRB 971, 982-987 (1948), *enfd.*, 175 F.2d 686 (2nd Cir. 1949), *cert. denied*, 338 U.S. 954 (1950).

> through a labor organization freely choosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ."

388 U.S. at 180. See *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944). The Court further stated:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . ."

388 U.S. at 181.

In more recent decisions, the Supreme Court has reaffirmed the right of a union to impose and enforce reasonable fines against members who engage in strikebreaking activities. In *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428-430 (1969), the Court emphasized the right of a union to enforce a properly adopted rule which reflects a legitimate union interest, impairs no statutory labor policy, and is reasonably enforced against union members. *See N.L.R.B.* v. *Marine Workers*, 391 U.S. 418, 423 (1968). *See also*

Rocket Freight Lines Co. v. *N.L.R.B.*, 427 F.2d 202, 205-206 (10th Cir.), *cert. denied*, 400 U.S. 942 (1970); Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187 (1969). In light of these developments,[7] it is clear that the Union acted within the sphere of its lawful authority when it decided to impose fines on the 24 strikebreaking members who did not resign from the Union.[8] Similarly, the Union's threats to enforce these fines, as well as its actual efforts to achieve court enforcement thereof, were not prohibited by the N.L.R.A.. However, a more difficult question arises with respect to the 119 employees who resigned from the Union during the strike period.

B. *The Employees Who Did Resign*

As the Supreme Court recognized in *Allis-Chalmers*, when Section 8(b)(1)(A) was enacted, "Congress was operating within the context of the 'contract theory' of the union-member relationship which widely prevailed at that time." *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 192. *See International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 618 (1958). Under this theory union membership was deemed in effect to create a "con-

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[7] The Company has asked this court to overrule *Allis-Chalmers* in order to force reconsideration of the union discipline area by the Supreme Court, but that is not our function. We recognize that "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2nd Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). In light of *Scofield* and *Marine Workers*, any argument for such reconsideration must be addressed to the Supreme Court itself. *See U. S. Gypsum Co.* v. *Steelworkers*, 384 F.2d 38, 42-44 (5th Cir. 1967), *cert denied*, 389 U.S. 1042 (1968); *United States* v. *Ullman*, 221 F.2d 760, 762 (2nd Cir. 1955), *aff'd.*, 350 U.S. 422 (1956).

[8] *See* Part II, *infra*, regarding the effect of the "reasonableness" of the fines imposed on their legality under § 8(b)(1)(A).

tract" between the labor organization and the member which imposed certain obligations on the member, and the decision emphasized "that 'The courts' role is but to enforce the contract.'" 388 U.S. at 182. *See* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L. J. 175, 180 (1960). It is, therefore, obvious that *membership* in the labor organization is the *sine qua non* to the authority of a union to impose desciplinary burdens upon the employees it represents. This has been widely recognized.

In *Allis-Chalmers*, the Court expressly limited its holding to "reasonable discipline of *members* who violate rules and regulations governing *membership.*" *N.L.R.B.* v. *Allis-Chalmers Mfg. Co. supra*, 388 U.S. at 181 (emphasis supplied). *See also id.* at 195-196.[9] The Labor Board specifically recognized this indispensable prerequisite in *Scofield*, 145 NLRB 1097, 1104 (1964), where it noted that "[a] union rule that a *member* is subject to a fine if he [violates a valid union rule] does not mean that he is subject to such a fine as an *employee.*" (emphasis in original) This membership requirement for union disciplinary authority was affirmed by the Supreme Court in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 429 n. 5:

> As an employee, [an individual] may be a "good, bad, or indifferent" member so long as he meets the finan-

[9] In *Allis-Chalmers*, all of the persons disciplined by the union enjoyed full membership status. Thus the Court was not required to decide what obligations vis-a-vis the union a person would be under where he was not a full member, but only a "limited member" who merely paid dues and fees in accordance with an appropriate union-security agreement. 388 U.S. at 197. *See* 29 U.S.C. § 158(a)(3) (1970); *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). Since the contracts involved in the instant case only contained maintenance-of-membership provisions, employees were either full members or total non-members. For this reason, we too intimate no view regarding the obligation which a union may lawfully impose on a person whose only ties with the labor organization are his payment of dues and fees.

> cial obligations of the union security contract. * * * But *as a union member, so long as he chooses to remain one, he is subject to union discipline.* (emphasis supplied)

See 394 U.S. at 435. Thus the Court recognized that "union members . . . are free to leave the union and escape the [union] rule." *Id.* at 430.[10] It is therefore apparent that *Booster Lodge 405 only had the authority to discipline those employees who were in fact Union members at the time they engaged in the complained of activity.*

Approximately 58 of the employees who worked during the strike submitted their resignations to the Union *after* they had already engaged in some of the conduct proscribed by the International Union Constitution. In light of the above discussion regarding union authority over action undertaken by full members, we must concur in the Board's determination that the Union did not violate Section 8(b)(1)(A) *so far as its imposition of disciplinary fines concerned this pre-resignation conduct.* The fact that the fines were not officially imposed for these pre-resignation breaches of Union regulations until after the strikebreakers had resigned, in no way negated the authority of the Union

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[10] "[N]o employee is subject to union rules if he chooses to forego the privileges and duties of union membership." Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 190 (1969). *See International Association of Machinists and Aerospace Workers, Local Lodge 504*, 185 NLRB No. 22, 75 LRRM 1008 (1970). Since unions are only authorized to impose discipline where legitimate *internal affairs* are concerned, *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra; Scofield* v. *N.L.R.B., supra; N.L.R.B.* v. *Marine Workers*, 391 U.S. 418, 424 (1968); *Local 138, International Union of Operating Engineers*, 148 NLRB 679, 682 (1964), it is clear that any effort to fine non-members would constitute an attempt to affect *external activities*, an area in which Congress did not intend to permit such union regulation. This was correctly recognized by the N.L.R.B. in this case.

over these persons with respect to these acts, as the N.L.R.B. properly recognized.

> The provisions of a contract are enforceable, and a cause of action can be brought upon them, even after the expiration or termination of the agreement. The rights and duties created by an agreement thereof. Thus the termination of some employees' membership here did not affect the Union's subsequent assertion of rights which had accrued to the Union during their earlier period of membership, such as the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them.

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, 185 NLRB No. 23, 1970 CCH NLRB ¶ 22,259, at p. 28,693 (1970).[11]

C. *Fines Imposed for Post-resignation Conduct*

An extremely difficult question is presented with respect to the fines which were imposed upon employees for their *post*-resignation conduct.[12] Booster Lodge 405 has made a sophisticated argument which would expose persons who were members at the commencement of a particular strike to union discipline with respect to any strikebreaking action undertaken during that specific work stoppage. Although it concedes that such a restriction is not contained in any of

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[11] A resignation acts to terminate the existing relationship so far as the incursion of future obligations is concerned. Previously established or perfected liabilities survive the termination. *See* 5A CORBIN, CONTRACTS § 1229, pp. 508-510 (1964).

[12] This would, of course, include the approximately 61 persons who resigned from the Union *before* engaging in any strikebreaking activity, as well as the 58 persons discussed previously, who resigned during the period of their strikebreaking, so far as their actions undertaken *after* they effectively resigned are concerned.

the express language of the International Union Constitution or By-laws, the Union urges this court to "flesh out" such documents by imposing such an obligation by implication. We must decline this invitation.

It must be emphasized that in situations like this, while "the function of the court is to determine, as far as is possible, the intention of the contracting parties and to give legal effect thereto," [13] it is generally recognized that courts will not usually imply offenses not specified in a union's constitution or by-laws.[14] We believe that this latter consideration is controlling with respect to the instant case. As the Union recognizes, there is nothing in the record which evidences any intention on the part of the approximately 119 persons who resigned during the strike in question that their initial acceptance of Union membership would impose upon them the type of continuing obligation which Booster Lodge 405 now asks this court to impose. Furthermore, the very fact that they resigned during this period, in an obvious attempt to escape the disciplinary authority of the Union, belies this proposed line of reasoning.

In addition, an extremely important national labor policy militates against the imposition of such an implied obligation. Section 7 of the N.L.R.B.[15] expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act. While *Allis-Chalmers* and *Scofield* recognized the legality of certain *express* union provisions limiting an employee's freedom where he had voluntarily accepted full union membership, nothing in those decisions supports the Union's theory of implied, post-resignation restrictions. In fact, language

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[13] 1 CORBIN, CONTRACTS § 95, p. 396 (1963).

[14] Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1059-1061 (1951), and *see* cases cited therein.

[15] 29 U.S.C. § 15 (1970). *See* n. 4, *supra*.

in *Scofield* expressly indicates otherwise. The Supreme Court only recognized the right of a union "to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union *members who are free to leave the union and escape the rule.*" *Scofield v. N.L.R.B., supra,* 394 U.S. at 430 (emphasis supplied). As the Board properly concluded below, after resignation, "[b]oth the member's duty of fidelity and the union's corresponding right to discipline him for breach of that duty are extinguished." *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, supra,* 1970 CCH NLRB ¶ 22,259, at p. 28,692.

The Union has relied heavily upon the First Circuit's holding in *N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029,* 446 F.2d 369 (1st Cir. 1971), but we believe that the decision is inapposite to the present fact situation. Although the court in *Granite State* upheld the right of the union involved to impose fines on strikebreakers for post-resignation activity, it emphasized that a specific set of facts was present which it believed rendered such a result equitable, and it specifically recognized that these considerations were not present with respect to the instant Booster Lodge 405 case.[16] In *Granite State,* the Board conceded that all of the fined employees had voted in favor of the strike in question.[17] It is also important to note that the fines had not been imposed pursuant to a general provision in the union constitution, as here, but rather in accordance with a specific proclamation which had been unanimously adopted by the membership after the work stoppage commenced. *See* 446 F.2d at 370, 372 n. 5. Further-

[16] *See* 446 F.2d at 372 n. 5, wherein the First Circuit distinguished the facts present in the instant case from those present in *Granite State.*

[17] 446 F.2d at 370, n. 2. In the present case, there is no evidence that the disciplined strikebreakers voted to strike.

more, all of those who were disciplined in *Granite State* had been expressly pre-warned of possible punishment for strikebreaking,[18] while the employees with whom we are herein concerned received no such pre-strikebreaking notification. Because of these distinguishing facts, we refuse to apply the rationale of *Granite State* to the instant factual situation.[19] The strong equities which weighed in favor of the union there, are clearly not present here. In fact, their very absence powerfully supports the result which we have accepted.

Since the International Union Constitution and By-laws contained no express restriction upon a member's right to resign, it is clear that the strikebreaker/employees were free to resign at will, subject only to their being bound by any permissible collective bargaining agreement provision limiting this right. *Local Union 621, United Rubber, Cork, Linoleum and Plastic Workers of America*, 167 NLRB 610 (1967); *Communications Workers v. N.L.R.B.*, 215 F.2d 835 (2d Cir. 1954); *N.L.R.B. v. Mechanical and Allied Production Workers, Local 444*, 427 F.2d 883 (1st Cir. 1970). Furthermore, since the resignations all occurred after the termination of the 1963-1965 agreement and before the execution of the new contract, the maintenance-of-membership provision was not applicable to limit this right either. *N.L.R.B.* v. *Mechanical and Allied Production Workers, Local 444, supra*, 427 F.2d at 884-885; *N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029, supra*, 446 F.2d at 372. Under these circumstances we concur in the reasoning of the Second Circuit in *Communications Workers* v. *N.L.R.B., supra*, 215 F.2d at 838:

> We agree that the proviso [to § 8(b)(1)(A)] protects the Union's right to make its own rules with re-

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[18] 446 F.2d at 371.

[19] To the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it.

spect to membership, but assuming, *arguendo*, that a rule wholly prohibiting voluntary resignations would be valid, we think that in the absence of any rule on the subject of voluntary resignation, the *proviso* is inapplicable. Concededly the Union Constitution and by-laws are absolutely silent as to whether a member can voluntarily resign. Hence we think that the common law doctrine on withdrawal from voluntary associations is apposite. Under that doctrine, a member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association. [citations omitted] [20]

For the reasons set out above, we conclude that the Labor Board correctly determined that "the Union's right to discipline employees terminated upon the employees' submission of their letters of resignation [, thus t]he attempted imposition of discipline for subsequent conduct was beyond the powers of the Union." *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, supra*, 1970 CCH NLRB ¶ 22,259, at p. 28,692.[21]

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[20] We express no opinion herein concerning the legality of any union constitution or by-law provision expressly limiting the right of a member to resign during the period of an ongoing strike. *Compare N.L.R.B.* v. *International Union, U.A.W.*, 320 F.2d 12 (1st Cir. 1963). We similarly intimate no view regarding the legality of any such provision expressly imposing a continuing obligation on any resigning member to refrain from strikebreaking during a work stoppage which was properly commenced prior to the time of the resignation.

[21] It is clear, as the Board has recognized, that the "resignations were effective *upon receipt of notification by the Union.*" *Local 1012, U.E.*, 187 NLRB No. 46, 76 LRRM 1038 (1970) (emphasis supplied). *See Belle-Moc, Inc.*, 81 NLRB 6, 7 (1949); *Koenig Bros.*, 108 NLRB 304 (1954); *N.L.R.B.* v. *Vapor Recovery Systems Co.*, 311 F.2d 782, 785 (9th Cir. 1962). Any questions which may possibly arise concerning the effective dates of particular employee resignations can either be determined by the Board on remand of the reasonableness issue, in accordance with Part II of this opinion, or, if the N.L.R.B. prefers, such

We therefore affirm the Board's finding that the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage.[22] Since the imposition of fines under such circumstances violated the policies underlying the N.L.R.A. and had effects outside the area of internal Union affairs, they were clearly "coercive" within the meaning of Section 8(b)(1)(A). *See N.L.R.B. v. Marine Workers*, 391 U.S. 418 (1968); *District 50, Local 12419*, 176 NLRB No. 89, 71 LRRM 1311 (1969); *Local 138, International Union of Operating Engineers, AFL-CIO*, 148 NLRB 679 (1964). *See also International Molders and Allied Workers, Local 125*, 178 NLRB 208, 72 LRRM 1049 (1969), enfd., 442 F.2d 92 (7th Cir. 1971).[23] We thus grant enforcement of the

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problems may be left for resolution at the compliance stage or in supplemental proceedings. *United Steelworkers of America, Local 5571* v. *N.L.R.B.*, 130 U.S. App. D.C. 369, 373, 401 F.2d 434, 438 (1968), *cert. denied*, 395 U.S. 946 (1969). *See American Fire Apparatus Co.* v. *N.L.R.B.*, 380 F.2d 1005, 1007 (8th Cir. 1967); *N.L.R.B.* v. *International Longshoremen's Union, Local 12*, 378 F.2d 125, 130 (9th Cir 1967), *cert. denied*, 389 U.S. 846 (1967); *N.L.R.B.* v. *Darling & Co.*, 420 F.2d 63, 66 (7th Cir. 1970).

[22] This would include the Union's effort not only to discipline those employees who had resigned from membership before engaging in any strikebreaking, but also the organization's imposition of fines on those who resigned during the period of their strikebreaking, to the extent that such discipline was imposed as a result of their post-resignation conduct.

[23] The fact that the fines imposed upon the employees for conduct undertaken after they had severed their ties with the Union might not have been collectable in a subsequent collection suit, does not detract from the fact of their coerciveness at the time they were imposed. *See N.L.R.B.* v. *American Bakery and Confectionery Workers, Local 300*, 411 F.2d 1122, 1126 (7th Cir. 1969). *See also Local Union No. 167, Progressive Mine Workers of America* v. *N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

N.L.R.B.'s cease and desist order so far as it concerns the imposition of fines for post-resignation conduct.[20]

II

The Board's Duty to Determine the Reasonableness of Fines

In its decision below, the N.L.R.B. relied upon a companion case, *International Association of Machinists and Aerospace Workers, Local 504* [Arrow Development Co.], 185 NLRB No. 22, 75 LRRM 1008 (1970),[21] in concluding that a fine's "reasonableness" has no effect upon its legality under the N.L.R.A. This conclusion was based upon the Board's belief that Congress did not intend to empower the Labor Board with the authority to examine the severity of union discipline when ascertaining its legality, and it indicated that it thought that local courts were the most logical tri-

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[20] This result also supports the Board's conclusion that the Union fines which were imposed upon the approximately 35 persons who apologized and pledged loyalty, should be confined to 50% of their *pre-resignation* strikebreaking earnings, since any attempt to enforce the discipline with respect to *post-resignation* remuneration could be reasonably construed as an effort to punish the very conduct which we have held the Union may not so regulate. "While it is true that [the Board's] retroactive order might [afford] these employees a better position . . . the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act." *Leeds & Northrup Co.* v. *N.L.R.B.*, 391 F.2d 874, 880 (3rd Cir. 1968). We therefore grant enforcement to that part of the Board's order which limits enforcement of such fines to 50% of pre-resignation earnings, which we believe results in the enforcement of a reasonable fine. Similarly, the prohibition against holding Union office, which, with respect to these persons, was calculated on a pro rata basis reflecting the number of strikebreaking days each worked, must necessarily also be restricted so that the length of such prohibitions will only reflect preresignation activity. *See* expanded discussion of the Board's remedial authority in Part III of this opinion, *infra*.

[21] Appeal is now pending before the Ninth Circuit, *sub nom. David O'Reilly* v. *N.L.R.B.*, No. 26,892.

bunals for the establishment of standards of reasonableness. The Board therefore refused to examine the question of reasonableness in the present case, despite an express determination by the Trial Examiner that the imposed fines were impermissibly excessive. We reject the position of the Board,[26] and remand the case for further proceedings in conformity with the views set out below.[27]

The Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8(b)(1)(A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions. In *Allis-Chalmers*, the Court stated:

> It is no answer that the proviso to §8(b)(1)(A) preserves to the union the power to expel the offending

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[26] We emphasize the fact that in the instant case, the Union not only threatened to utilize court action to enforce the fines imposed, but in several instances, actual collection suits were begun. Under such circumstances, we believe that the reasonableness of the fines in question is highly relevant to the question of their legality under § 8(b)(1)(A). We intimate no view regarding the need for an examination of the reasonableness of disciplinary fines where the only enforcement mechanism contemplated by the union involves the expulsion of the individual from the union.

[27] Although the Union has argued that the aggrieved employees should not have the right to have a Board determination concerning the reasonableness of the fines imposed, due to the fact that they have not exhausted all available internal Union remedies, we reject this contention. An individual need not, in all cases, exhaust all internal union procedures before seeking the services of the N.L.R.B. *See N.L.R.B. v. Marine Workers*, 391 U.S. 418 (1968); *Local 138, International Union of Operating Engineers*, 148 NLRB 679 (1964). The imposition of such a requirement in this case concerning the reasonableness issue would not, in our opinion, best serve the interests of justice or further the objectives of the N.L.R.A. The issue here involves public policy and thus transcends the pure internal affairs of the Union. 391 U.S. at 422-428.

member. Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine.*

N.L.R.B. v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 183 (emphasis supplied). The Court further recognized that "the proviso preserves the rights of unions to impose fines, *as a lesser penalty than expulsion . . .*" 388 U.S. at 191-192 (emphasis supplied).[28] This implicity recognized that, for a disciplinary fine to be less coercive than expulsion from the union, the fine imposed must be a "reasonable" one, for it is intuitively obvious that enforcement of a grossly excessive fine might visit a far greater burden upon an individual than would mere expulsion.[29] The Supreme Court also ex-

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[28] Justice White, in his concurring opinion, observed:

> [S]ince expulsion would in many cases—certainly in this one involving a strong union—be a far more coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method [court action] which may be far less coercive.

388 U.S. at 198 (emphasis supplied). It is also informative to note the express interpretation given to the *Allis-Chalmers* opinion by the dissenting members of the Court: "[T]he Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike." 388 U.S. at 200-201 (dissenting opinion of Black, J.) (emphasis supplied).

[29] Even the attorney who argued *Allis-Chalmers* for the union before the Supreme Court has recognized this limitation in the Court's decision. He has indicated that *Allis-Chalmers* only determined that "a union suit to collect a *reasonable fine* imposed on a member for violating a 'no strikebreaking' rule does not violate section 8(b)(1)." Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187, 190 (1969) (emphasis supplied).

pressly recognized this fact in its recent *Scofield* decision, wherein it concluded that the enforcement of a proper union rule "by *reasonable fines* does not constitute the restraint or coercion proscribed by §8(b)(1)(A)." *Scofield* v. *N.L.R.B.*, *supra*, 394 U.S. at 436 (emphasis supplied). The *Scofield* Court emphasized that under *Allis-Chalmers*, "[a] union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike [is] . . . enforceable against voluntary union members by expulsion or a *reasonable fine*." 394 U.S. at 428 (emphasis supplied). In light of the Court's emphasis on the requirement of "reasonable fines" if a union is to avoid a violation of the Act in these circumstances, we must conclude that the imposition of an unreasonably large fine, at least where the union threatens or actually attempts court enforcement of the fine, may be coercive and restraining within the meaning of section 8(b)(1)(A).

Since the imposition of an unreasonably excessive disciplinary fine is violative of Section 8(b)(1)(A), it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised. The Board asserts that such a result might cause conflicts between it and state courts which attempt to examine the reasonableness issue in actions to collect such fines. However, we do not believe that this possible problem detracts from the Board's obligation under the N.L.R.A.[30]

We recognize that "state courts have been adjudicating internal union disputes for more than 60 years." Summers, *The Law of Union Discipline: What the Courts Do in Fact*,

[30] The question of the extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law is not before this court, and we intimate no view concerning the resolution of this complex issue. *Compare San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959), *with Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966). *See N.L.R.B.* v. *Allis Chalmers Mfg. Co.*, *supra*, 388 U.S. at 197 n. 37.

70 YALE L.J. 175 (1960).[31] We further acknowledge the fact that "the state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe [monetary] hardship.' "[32] However, these considerations do not relieve the N.L.R.B. of its duties under the N.L.R.A. "[T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .' §10(a), . . . 29 U.S.C. §160(a)." *N.L.R.B. v. Strong*, 393 U.S. 357, 360 (1969). *See Office and Professional Employees International Union, Local 425* v. *N.L.R.B.*, 136 U.S. App. D.C. 12, 15-16, 419 F.2d 314, 317-318 (1969).[33] Furthermore, the fact that

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[31] *See* cases cited 70 YALE L. J. at 175 n. 3. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield* v. *N.L.R.B.*, *supra*, 394 U.S. at 426 n. 3.

[32] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, *supra*, 388 U.S. at 193 n. 32, quoting from Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1078 (1951). For some examples of state court willingness to examine the reasonableness of union disciplinary fines, *see: North Jersey Newspaper Guild, Local 173* v. *Rakos*, 110 N.J. Super 77, 74 LRRM 2487 (N.J. Sup. Ct., App. Div. 1970); *L.A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct., App. Dept. 1969); *Walsh* v. *Communications Workers of America*, 75 LRRM 2629, 2632 (Md. Ct. of App. 1970); *McCauley* v. *Federation of Musicians, Local 294*, 26 LRRM 2304 (Pa. Ct. of Com. Pls. 1950).

[33] Although the Union has cited language in *U.O.P. Norplex, Div. of Universal Oil Products Co.* v. *N.L.R.B.*, 445 F.2d 155, 158 (7th Cir. 1971), stating that "[t]he reasonableness of . . . fines is a matter for the state court to determine should the Union seek judicial enforcement of the fines," in support of its contention that this issue is outside the scope of the Board's authority, this statement is clearly not apposite to the present case. The Court was there concerned with whether the subject of internal

some state courts might not permit enforcement of excessive fines in a collection action by the union, does not detract from their coerciveness, or the need for N.L.R.B. action. *N.L.R.B.* v. *American Bakery and Confectionery Workers, Local 300*, 411 F.2d 1122, 1126 (7th Cir. 1969). *See Local Union No. 167, Progressive Mine Workers of America v. N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

Other factors also support the conclusion that Board intervention is authorized in this very limited area, despite the historical activity of state courts and the reluctance of the 80th Congress to interfere in the internal affairs of unions. There is something to be said for having the reasonableness of fines determined by standards that are as nearly uniform as national standards promulgated by the N.L.R.B. can be. Furthermore, access to the Labor Board is more readily available than meaningful access to state courts. Before the Board, the employee is represented by the General Counsel, and the agency bears the expense of the litigation. If the same employee wants a complete resolution of the reasonableness issue in a state court collection action brought by the union, he must be prepared to accept at least some financial burden. "The danger that the legal rights of a disciplined member will go by default because of the cost of asserting them in court is obvious . . ." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 220 (1960). We therefore reject the argument that the N.L.R.B. is required to defer to state tribunals with respect to the reasonableness issue. Such "reverse preemp-

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union fines was a mandatory subject for collective bargaining, and it recognized that "even *if the fines were excessive, the remedy would be for the company to file an 8(b)(1)(A) charge against the union*, not to try to convert an otherwise non-mandatory subject of bargaining into a 'term or condition of employment'." 445 F.2d at 158 n. 7 (emphasis supplied). The Boeing Company followed the exact procedure suggested.

tion" would not, in our view, be consonant with the principles underlying the N.L.R.A.[34]

Although the Board has not previously had to examine the reasonableness of union fines, it is not without experience in a related area. Under Section 8(b)(5),[35] it is required to determine whether initiation fess required by a labor organization under a union-security agreement are excessive.[36] The fact that Section 8(b)(1)(A) does not provide the Board with specific standards to be applied in determining the reasonableness of a union fine, while Section 8(b)(5) does include several express standards, does not detract from the N.L.R.B.'s authority under 8(b)(1)(A). *See N.L.R.B. v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 582-583 (1961). "Experience and com-

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[34] We emphasize the fact that "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board . . ." *N.L.R.B.* v. *Truck Drivers Union*, 353 U.S. 87, 96 (1957). This is the very function which the Board is being asked to perform here.

[35] 29 U.S.C. §158(b)(5) (1970), which provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (5) to require of employees covered by an agreement authorized under subsection (a)(3) [, i.e., a union-security provision,] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount *which the Board finds excessive* or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; (emphasis supplied)

[36] *See, e.g., Longshoremen, I.L.A., Local 1419*, 186 NLRB No. 94, 75 LRRM 1411 (1970), wherein a violation of §8(b)(5) was found. *See also N.L.R.B.* v. *Television & Radio Broadcasting Studio Employees, Local 804*, 315 F.2d 398 (3rd Cir. 1963).

mon sense will supply the grounds for the performance of this job," which we have concluded was implicitly entrusted by Congress to the Board. 364 U.S. at 583.

The Board must remember that a fine imposed for the violation of a legitimate union rule should be viewed as presumptively protective, and therefore privileged, when the amount of the fine, taking into account the character and importance of the ends served by the rule being enforced, is reasonably related to the need for protection. On the other hand, if the amount of the fine is such as to be inordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed upon the member, not in vindication of a legitimate union interest, but rather as a reprisal for his having exercised a statutorily protected right. In the latter situation, as we have previously indicated, the fine would be "coercive" within the meaning of Section 8(b)(1)(A) of the Act. In determining whether an imposed fine is privileged or prohibited, due to its size, many factors may properly be considered by the Board. We shall mention several obvious factors which might be considered on remand, along with others the Board may consider to be applicable.

The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined, the detrimental effect of the strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant.

One additional consideration is worthy of mention. In its original *Scofield* decision, 145 NLRB 1097, 1104 (1964), the Board expressly indicated that a union had no right to

impose any penalty which would "impair the member's status as an employee." This prohibition against union disciplinary action adversely affecting an employee's employment status has been approved by the Supreme Court. *See N.L.R.B. v. Allis-Chalmers Mfg. Co., supra,* 388 U.S. at 195; *Scofield v. N.L.R.B., supra,* 394 U.S. at 423, 428. While this principle clearly prohibits a union from seeking the suspension or termination of an employee by his employer due to his strikebreaking,[37] its implications may have further application which might be relevant to the present case. Where a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension. On remand, the Board might also consider this protective policy of the Act in determining the reasonableness of the fines in question under Section 8(b)(1)(A).[38]

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[37] *See* 29 U.S.C. § 158(b)(2) (1970), which provides, *inter alia:*

> (b) It shall be unfair labor practice for a labor organization or its agents—
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> • • • • • • • •
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . .

29 U.S.C. § 158(a)(3) (1970), provides *inter alia:*

> (a) It shall be an unfair labor practice for an employer—
>
> • • • • • • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

[38] We, of course, recognize that Section 8(b)(2) was enacted to prevent a union from improperly interfering with an individual's employment relationship *through his employer.* However, this does not detract from the fact that this provision evidences a Congressional desire to protect an employee from any unreasonable adverse affect on his employment status by a labor organization. *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra,* 388 U.S. at 195; *Scofield* v. *N.L.RB, supra,* 394 U.S. at 123, 128.

III

Labor Board Remedy

Although we are remanding this case to the N.L.R.B. for further consideration of the reasonableness question, it is apparent that the other aspects of the Board's decision below should be immediately affirmed. As was noted earlier in this opinion, the cease and desist order prohibiting further Union action pertaining to post-resignation strike-breaking conduct is granted enforcement. A more difficult question arises with respect to the affirmative aspects of the Board's decision.

"In § 10(c) of the Act [39] Congress has given the Board broad power to fashion remedies to effectuate the policies of the Labor Act. So long as the Board exercises responsibility in its judgment, courts should not interfere with its remedy, since this is 'peculiarly a matter for administrative competence.' Phelps Dodge Corp. v. NLRB, 313 U.S. 177, at 194... (1941)." [40] "The Board's power to fashion remedies places a premium upon agency expertise and experience, and the broad discretion involved is for the agency and not the court to exercise." *Amalgamated Clothing Workers of America v. N.L.R.B.*, 125 U.S. App.D.C., 275, 281, 371, F.2d 740, 746 (1966).[41]

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[39] 29 U.S.C. § 160(c) (1970) authorizes the Board to require the perpetrator of an unfair labor practice "to take such affirmative action . . as will effectuate the policies of this [Act] . . ."

[40] *Office and Professional Employees International Union, Local 425* v. *N.L.R.B.*, 136 U.S. App.D.C. 12, 19-20, 419 F.2d 314, 321-322 (1969). *See Frank Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 704 (1944); *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 215-217 (1964). *See also N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

[41] *See* cases cited 125 U.S. App.D.C. at 281 n. 5, 371 F.2d at 746 n. 5.

With these considerations in mind, we clearly must affirm that part of the Board's order which requires the Union to reimburse the approximately 35 employees who apologized and pledged loyalty, thereby obtaining a reduction in their respective penalties, for any amounts paid which were based upon post-resignation strikebreaking earnings.[42] We similarly affirm that portion of the order requiring the total reimbursement of any fines paid by employees who effectively resigned before engaging in any strikebreaking activity.

With respect to the Board's order as it relates to the remaining employees who resigned, the Board established a reimbursement formula which pro rated each employee's respective fine, thereby limiting the collectable portion to that part which reflects the amount of pre-resignation conduct. It obviously believed that this was the most reasonable manner in which to rectify the effects of the Union's unfair labor practice with respect to these persons.

The utilization of remedial formulas has been approved by the Supreme Court. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Keeping in mind our limited review function, we are unable to conclude that "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). "While it is true that [such] a retroactive order might afford the employees a better position . . . the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act." *Leeds & Northrup Co.* v. *N.L.R.B.*,

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[42] *See* n. 24, *supra*, for further discussion of the remedy pertaining to these persons.

391 F.2d 874, 880 (3rd Cir. 1968).[43] We therefore must affirm this portion of the Board's affirmative reimbursement order.

The case is remanded to the Labor Board for further consideration of the questions relating to the reasonableness of the fines imposed by the Union.

So Ordered.

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[43] We are cognizant of the fact that the Union's $450.00 fine was imposed upon all strikebreakers—except those who apologized and pleaded loyalty—regardless of the number of days of strikebreaking engaged in by each. Although the Union argues that this fact indicates that no pro rata reduction should have been required by the Board with respect to these employees, we recognize the N.L.R.B.'s obvious desire to formulate an affirmative order would rectify the Union's improper attempt to punish post-resignation conduct. We cannot conclude that the Board has abused its broad discretionary authority in this area. *See N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-CB-779

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO and The Boeing Company

Decision and Order

On December 30, 1968, Trial Examiner Ramey Donovan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel, the Charging Party, and the Respondent each filed exceptions to the Decision, together with supporting briefs. The Charging Party filed a reply brief. Subsequently in response to an invitation of the Board, the Charging Party and the Respondent filed supplemental briefs. In response to the same invitation, statements of position were filed by the National Association of Manufacturers, and by the American Federation of Labor and Congress of Industrial Organizations, joined by the International Brotherhood of Teamsters and the International Union, UAW, as *amici curiae*.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the reply brief, the supplemental briefs, the statements of position *amici curiae*, and the entire record in the case. The Board adopts the Trial Examiner's findings of fact, but adopts his conclusions and recommendations only to the extent that they are consistent with the decision herein.

The essential facts of this case are not in dispute. Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called IAM or the Union, and Boeing were parties to a collective-bargaining agreement effective from May 16, 1963 through September 15, 1965.[1] Upon the expiration of the contract, the Union commenced a lawful strike against Boeing at its Michoud plant in New Orleans, Louisiana, and at various other locations. The strike lasted 18 days. On October 2, 1965, a new contract was signed. The strikers returned to work on the following day. Both contracts contained maintenance-of-membership clauses, which required new employees to notify both the Union and the Employer of their desire not to join the Union within 40 days of accepting employment.

During the strike period, some 143 employees of a unit of approximately 1900 production and maintenance workers crossed the picket line and reported for work. All had been members of the Union during the contract period. One group of strike-breaking employees, numbering some 24, made no attempt to resign from the Union. The remaining 119 strike-breaking employees submitted their voluntary resignations, in writing, to both the Union and the Employer.[2] Many

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[1] At the time of the execution of the 1963 agreement, Booster Lodge 405 was not in existence. Boeing's Michoud, Louisiana, plant was considered a "Remote Location" unit, identified with the "Primary Location" unit at Seattle-Renton, Washington. Production and maintenance employees in the Michoud unit were represented by Aeronautical Industrial District Lodge No. 751, IAM, AFL-CIO, Seattle, a signatory to the contract with Boeing. Booster Lodge No. 405 came into existence sometime later in 1963, but the contract was not modified to reflect this event.

[2] The Union objects to the fact that notices of resignation were sent to District Lodge 751 rather than to Booster Lodge 405. However, since Booster Lodge 405 was not a party to the original contract, as explained in footnote 1 *supra*, it would appear that employees who notified District Lodge 751 were attempting to comply with contractual requirements. Moreover, District Lodge 751 notified Booster Lodge 405 of all resignations.

resigned from membership prior to reporting for work during the strike. Others resigned during the course of the strike, but returned to work before submitting their resignations.[1] All resignations were submitted after the expiration of the original contract and before the signing of the new one. All were submitted prior to the imposition of discipline by the Union.

In late October or early November 1965, the Union notified all strikebreaking employees that charges had been preferred against them under the International Constitution for "Improper Conduct of a Member" in "accepting employment . . . in an establishment where a strike . . . exists." Employees were advised of the dates of their trials, which were to be held even in their absence, and of the availability of union-member counsel. Prior to the strike, the Union had not warned members about the possible imposition of disciplinary measures. However, the IAM constitution provides that members found guilty of misconduct after notice and a hearing are subject to "reprimand, fine, suspension, or expulsion from membership, or any lesser penalty or combination." The constitution sets no maximum dollar limitation on fines.

Fines were imposed on all strikebreaking employees, regardless of whether, or when, they had resigned from the Union. Employees who did not appear for trial were fined $450, as were those who appeared and were found guilty. The fines of employees who appeared for trial, apologized, and pledged loyalty to the Union were reduced to 50 percent of strikebreaking earnings. The level of fines was set by the union membership. There is no indication of the

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[1] Four-hundred-and-fifty dollar fines were imposed on 108 employees. Of these, 61 had resigned their union membership prior to reporting for work during the strike, and others resigned during the course of the strike. Reduced fines were imposed on 35 employees. The record as to the timing of their resignations is not clear.

method of computation. Strikebreaking employees earned between $2.38 and $3.63 per hour, or between $95 and $145 per 40-hour week. In some instances, earnings during the strike were supplemented by the inclusion of bonus or premium rates for weekends and overtime.

Reduced fines have been paid in some instances. Payments have averaged $40. None of the $450 fines has been paid. The Union has sent out written notices that the matter has been referred to an attorney for collection, that suit will be filed upon nonpayment of fines, and that reduced fines will be increased for $450 in the event of nonpayment. The Union has filed suit against nine individual employees to collect the fines (plus attorney's fees and interest). The outcome of the suits has not been determined.

A principal issue in this case is the legality of the Respondent's imposition of disciplinary fines upon individuals who had resigned from the Union before engaging in the conduct for which the discipline was imposed. The complaint alleges, and the Trial Examiner found, that the Respondent's action in fining employees in this category violated Section 8(b)(1)(A) of the Act. We agree with the Trial Examiner's conclusion.[4] However, as the Trial Examiner has not fully spelled out his reasoning in this regard, and in light of the views of our dissenting colleague, we believe that further explication of our reasoning is appropriate here.

Under Section 8(b)(1)(A) of the Act, it is an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of rights guaranteed in Section 7." Included among those rights is the right to refrain from

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[4] The Trial Examiner's reference to a "compounded" violation of Section 8(b)(1)(A) perhaps implies that the violation is merely derivative. On the contrary, we find, as spelled out more fully herein, that the very imposition of a fine on nonmembers violates the Act, regardless of the amount of the fine.

engaging in any of the protected concerted activities enumerated at the beginning of Section 7.

The levy of a fine is calculated to force an individual both to pay money and to engage in particular conduct against his will. This is true regardless of the ultimate collectibility of the fine. A man who is held up at gunpoint is coerced whether or not the gun is loaded. As with the levy of a fine, the coercion lies in the calculated threat and, as has been held, the "argument that the fines imposed were not collectible in a court of law, even if accepted is beside the point."[5] The imposition of a fine has immediate coercive consequences. Faced with the possibility of action against him, the employee may well be, for practical purposes, impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict.[6] Or, should he choose to take that risk, he will find it necessary to hire counsel whose services he ordinarily would not require.

The Board has long recognized that a fine is inherently coercive.[7] Yet in situations where a union imposes disciplinary fines on its *members* the Board has held that the union does not violate Section 8(b)(1)(A).[8] The basis of the Board's holdings in these early fine cases was the proviso

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[5] See *N.L.R.B.* v. *American Bakery and Confectionery Workers' Local Union 300*, 411 F.2d 1122, 1126, (C.A. 7), enfg. 167 NLRB 596.

[6] We do not share the confidence of our dissenting colleague in the ability of the ordinary employee to evaluate the ultimate legal consequences of the union's act. Nor would we require him to attempt to do so.

[7] See e.g. *Minneapolis Star & Tribune Co.*, 109 NLRB 727, 738.

[8] *Ibid. See also Local 283, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO (Wisconsin Motor Corp.)*, 145 NLRB 1097; *Local 248 et al., United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO (Allis-Chalmers Mfg. Co.)*, 149 NLRB 67.

to Section 8(b)(1)(A), which exempts "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership" from the coverage of that section. Although a union's membership rules may well be coercive, their enactment is specifically protected by the Act. In *Minneapolis, supra,* the Board construed the levy of the fine as the prescription of a rule with respect to the retention of union membership, and held that the union's conduct, which was protected by the proviso, therefore did not violate Section 8(b)(1)(A).

In affirming the Board's conclusions in *Allis-Chalmers,* the Supreme Court held that the body of Section 8(b)(1)(A) was not intended to reach the conduct of a labor organization in imposing and enforcing a fine upon its members for crossing an authorized picket line.[9] Thus, the Court found it unnecessary to pass on the Board's holding that the proviso protected the union's conduct. Nevertheless, the basis of the Court's holding was the underlying relationship between the union and its members. Throughout the opinion, the Court emphasized the right of unions to regulate their own internal affairs. Reference was made to the "contract theory" of union membership. And, finally, the Court cited the proviso to Section 8(b)(1)(A) as offering "cogent support for an interpretation of the body of Section 8(b)(1)(A) as not reaching the opposition of fines and attempts at court enforcement."

The significance of the membership relationship is that it establishes the union's authority over its members. In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right.[10] But the contract between the member and

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[9] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175.

[10] The power to discipline recalcitrant members is essential to the union's self-preservation. This coercive power is protected by the proviso to Section 8(b)(1)(A).

the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished.

In the case at bar, the Union's right to discipline employees terminated upon the employees' submission of their letters of resignation.[11] The attempted imposition of discipline for subsequent conduct was beyond the powers of the Union.[12] It was not consented to by the employees. Nor, in our view, was it protected by the proviso to the Act.

The holding in *Allis-Chalmers* was carefully restricted to the facts of that case. The Court expressly refused to pass on the legality of the imposition of a fine upon "limited members" of the union[13] It appears to us that in this reservation there was the implication that such a fine when levied against nonmembers constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A). The decisions in two subsequent fine cases reinforce that implication.

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[11] The Union takes the position that voluntary resignation from its ranks is impossible of achievement because its constitution and by-laws set forth no procedure for such resignations. As this argument is contrary to long-standing Board precedent, we reject it here. See *Communications Workers of America, CIO (New Jersey Bell Tel. Co.)*, 106 NLRB 1322, enfd. 215 F.2d 835 (C.A. 2); *Local Union No. 621, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO (Atlantic Research Corp.)*, 167 NLRB 610; *District Lodge 751, International Association of Machinists & Aerospace Workers, AFL-CIO (Boeing Co.)*, 173 NLRB No. 71. Moreover, as indicated *infra*, the Supreme Court in the *Scofield* case expressly sanctioned the strategy of leaving the union to avoid discipline.

[12] The Union's disciplinary authority was, as we hold, limited to conduct engaged in during the period of membership.

[13] While the court did not specifically refer to the fining of nonmembers, the cited reservation indicates the relevance of the membership issue.

In its recent *Scofield* opinion,[14] the Supreme Court summarized its construction of Section 8(b)(1)(A) as follows:

> [The section] leaves a union free to enforce a properly-adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced *against union members* who are free to leave the union and escape the rule. [Emphasis supplied.]

This suggests that the prohibitions of Section 8(b)(1)(A) encompass union rules which do not conform with the enumerated qualifications. Included in this latter category is a rule enforced against nonunion members. By observing that members could "leave the union and escape the rule," the Court seems to have envisaged the possibility that union members could, indeed, resign membership and avoid discipline.

In the *Shipbuilding Workers* Case,[15] the Supreme Court found unlawful a union's attempt to discipline members for filing charges with this Board before exhausting their intra-union remedies. The Court construed Section 8(b)(1)(A) as assuring a union freedom of self-regulation only "where its legitimate internal affairs are concerned." But the imposition of discipline upon nonmembers can hardly be deemed an internal affair.

Our dissenting colleague treats *Allis-Chalmers* as if it existed in a vacuum, overlooking subsequent decisions and the statutory provisions themselves. But to extend the *Allis-Chalmers* doctrine beyond the perimeters of the situation there involved is to emasculate the provisions of Section 8(b)(1)(A). Such a result can hardly have been intended by the Supreme Court. It should not be reached here. In the interplay between the statutory policy to prevent coer-

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[14] *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423.

[15] *N.L.R.B.* v. *Marine & Shipbuilding Workers*, 391 U.S. 418.

cion of employees for exercising Section 7 rights on the one hand, and the policy to permit unions to guide their internal affairs and determine their membership qualifications on the other, the former must prevail where the membership relation which justifies the latter is terminated.

For the foregoing reasons, we find that the Respondent violated Section 8(a)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations. We shall order the Respondent to cease and desist from such conduct, including attempts to collect the illegal fines through court proceedings.

Also at issue in this case is the legality of the Respondent's imposition of disciplinary fines upon two other categories of strike-breaking employees, those who crossed the picket line without resigning from the union, and those whose resignations were submitted after the commencement of strikebreaking activities but prior to the initiation of disciplinary action against them. The legality of the imposition of discipline upon members for conduct engaged in during the period of membership is clear.[16] Accordingly, we find that the Respondent did not violate Section 8(b)(1)(A) by fining the nonresignees. Nor, in our opinion, does the Respondent's failure to exercise its disciplinary authority with respect to the second group until after the submission of

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[16] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra.* As a majority of the Board (Members Fanning, Brown, and Jenkins), would find that the legality of union fines does not depend on their reasonableness, the Board does not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. See *Arrow Development Corp.*, 185 NLRB No. 22, issued this day. For the reasons stated in his dissenting opinion in the *Arrow* case, Chairman McCulloch would examine the amount of the fines to determine their reasonableness in those situations where the union's imposition thereof and threatened or actual court action to collect such fines would in all other respects be lawful. Where expulsion from membership is clearly the only available method of enforcement, he would consider the size of a fine irrelevant.

their resignations affect the legality of its action. As the source of the Union's disciplinary authority lies in the contractual relationship between the organization and its members, it is to the rules of contract law that we turn in evaluating the Union's conduct. The provisions of a contract are enforceable, and a cause of action can be brought upon them, even after the expiration or termination of the agreement. The rights and duties created by an agreement are extinguished only prospectively by the termination thereof. Thus the termination of some employees' membership here did not affect the Union's subsequent assertion of rights which had accrued to the Union during their earlier period of membership, such as the right to discipline the employees for prior strikebreaking. The effect of these employee's resignations was only to extinguish the Union's future authority over them.

Accordingly, we further find that the Respondent did not violate Section 8(b)(1)(A) of the Act by fining former members for misconduct engaged in prior to their resignations from among its ranks. However, this conclusion does not legitimize the imposition of discipline for conduct engaged in after the resignations. We shall order the Respondent to cease and desist from such action, and to remit a prorata portion of the fine, so that what remains reflects only preresignation conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees, who had resigned from and who were no longer members of the Union,

in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines against such employees because of their post-resignation conduct in working at the Michoud plant during the September 1965, strike, or by threatening to seek or seeking court enforcement of such fines.

(b) In any like or related manner, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this Order, who have paid fines under the circumstances described in that paragraph, the amount of said fines imposed because of post-resignation conduct in working at the plant.

(b) Post at its office and meeting hall and at the Michoud, Louisiana plant of the Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 15, shall, after being signed by an authorized representative, shall be posted at the aforementioned locations, in conspicuous places, including all places where notices to employees are customarily posted, and reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[17] In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that those portions of the complaints as to which no violation has been found be, and they hereby are, dismissed.

Dated, Washington, D. C., August 27, 1970.

JOHN H. FANNING,	Member
FRANK W. MCCULLOCH,	Member
HOWARD JENKINS, JR.,	Member

(Seal)

NATIONAL LABOR RELATIONS BOARD

Member Brown, concurring in part and dissenting in part:

I join with my colleagues in dismissing the allegations of the complaint with respect to the imposition of discipline upon members for conduct engaged in during their period of membership. However, I would also dismiss the remaining allegations concerning the imposition of fines upon purported resigners from the Union.

My colleagues' disposition of this question is predicated upon the premise that an employee, faced with the threat of a union fine, "may well be impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict." But this is what *Allis-Chalmers* was all about. There, a union fine, or the threat of it, expressly designed to force employees to "forego [their] statutory right not to honor the Union's picket line" was nevertheless held not to violate Section 8(b)(1)(A) even though such a fine was collectible, or collected, in court. The Supreme Court reasoned that 8(b)(1)(A) was not intended to apply to this kind of coercion. If, as is the case here, a Union does not violate 8(b)(1)(A) by imposing or threatening to impose a collectible fine, it is difficult to see how a presumably uncollectible fine can be violative of that Section. Even if, as the majority reasons, the employee concerned may not be sufficiently knowledgeable to evaluate the Union's fine

as "un-collectible," and thus feel completely free to cross the picket line with impunity, he is plainly no more coerced than the full-fledged member.

A further consideration, ignored by my colleagues, impels me to this view. Each of the employees involved here, and in all other situations of which I am aware, was a member of the Union in all senses of the word before the strike began. Thus the fealty owed by a member to his union in effect came into play when the strike was authorized and began, and a "resignation" at that point was already a disloyal action from the standpoint of the Union and his fellow members. Moreover, I cannot conceive of a case arising where a union would "fine" someone who had never been its member at all. It is only because the employees here were, in the eyes of the Union, and pursuant to the Union's constitution and bylaws, still Union members, that the fines would have any impact at all upon them. In this respect, whether employees are still members of the Union for purposes of imposition of a Union fine, the proviso to 8(b)(1)(A), in express terms, applies to a union's rules for acquisition or retention of membership.[18]

For all these reasons, I would find no violation of Section 8(b)(1)(A) of the Act in a Union's fining a nonmember or a purported nonmember.

Dated, Washington, D. C., August 27, 1970.

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

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[18] The cases cited by my colleagues in footnote 11 concern a Union's application of its membership rules to his job tenure, and thus are inapposite to the instant situation, where the rules pertain solely to another internal union matter.

TXD-737-68
New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

and Case No. 15-CB-779

THE BOEING COMPANY

Thomas Johnston, Esq., for the General Counsel of the N.L.R.B.
C. Paul Barker, Esq. (Dodd, Hirsch, Barker & Meunier), for the Respondent.
C. Dale Stout, Esq. (Kullman & Lang), for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

RAMEY DONOVAN, Trial Examiner: The charge in this case was filed on February 18, 1966 by The Boeing Company, herein the Employer or Boeing. The General Counsel of the N.L.R.B., herein the General Counsel, issued a complaint under date of August 9, 1968 against Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-

CIO, herein Respondent or the Union. The Complaint alleged that in the period October-December 1965, and January 1966, the Union levied fines against named employees and other employees of Boeing in the sum of $450 each for crossing the union's picket lines and working during a union strike against Boeing from September 16, 1965 to October 4, 1965. It is alleged that the above fines were unreasonable, excessive, and discriminatory. Further alleged is that, in the period aforementioned, the Union levied fines against named and other employees for the same reasons described above although these employees had resigned from the Union prior to working during the strike and prior to being fined. These fines are also alleged to be unreasonable, excessive and discriminatory. The complaint additionally alleges that in connection with all the fines in the situations hereinabove, Respondent instituted or threatened to institute legal proceedings against employees who failed or refused to pay the fines. All the aforementioned conduct is alleged to have restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and thereby constituted a violation of Section 8(b)(1)(A) of the Act.

In general terms, Respondent's answer denies the allegations of the complaint aforedescribed although admitting that Respondent "did institute legal proceedings against certain employees who failed or refused to pay fines imposed upon them."

The case was tried before Trial Examiner Ramey Donovan in New Orleans, Louisiana on October 2-3, 1968. All parties were represented by Counsel.

I. Jurisdiction

Boeing is a Delaware corporation with its principal office in Seattle, Washington, and it is engaged in the manufacture of aircraft and aircraft parts at Wichita, Kansas, and at Seattle and Renton, Washington. Boeing also operates a plant at New Orleans, Louisiana, known as the Michoud plant, which is the only plant directly involved in this proceeding. The Michoud plant is performing work for the National Aeronautics and Space Administration. It is estimated that in September 1965 approximately 6000 employees were employed at Michoud, of which approximately 1500-1900 employees were in the unit represented by Respondent Union.

Boeing is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Facts

A contract between Boeing "and The International Association of Machinists, AFL-CIO and those of its lodges now and hereafter representing employees of the Company ..." was in effect from May 16, 1963 to September 15, 1965. Various units of production and maintenance employees were covered by the contract, such as the Seattle-Renton unit; the Atlantic Missle Test Section unit; the Wichita unit. The Seattle-Renton

unit included company employees in the unit in the State of Washington and company employees in the unit "at Remote Locations identified with the Seattle-Renton Primary Location ...." Following a description of the Seattle-Renton unit the contract states that "Such unit is primarily identified with the Primary Location known as Seattle-Renton and with Aeronautical Industrial District Lodge No. 751 (IAM, AFL-CIO)."[1] A "Remote Location" is defined as "a company operation located in an area away from a Primary Location and designated by the Company as a Remote Location, such as Michoud Plant . . . ." The signatories to the contract were the IAM and Boeing and District Lodge 751; District Lodge 70; and Banana River Lodge 2061.

Booster Lodge 405, herein Lodge 405, which embraces the unit employees at Michoud, was not in existence at the time of the execution of the above contract. At that time, Michoud was a "Remote Location" under the contract, the Primary Location being Seattle-Renton. The unit was identified with the Primary Location and with District Lodge 751, Seattle. Lodge 405 came into existence sometime later in 1963. Lodge 405 is not mentioned in any contract until the contract that was executed in October, 1965.

The contract provides that until employees who are members of the Union or who become members are required to maintain their membership as a condition

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[1]Aeronautical Industrial District Lodge No. 751 will be referred to as District Lodge 751.

of employment. Employees hired after the effective date of the contract, who are not members of the Union, have a specified period in which to give notice that they do not desire to become union members. Such notice, in writing, is to be sent to District Lodge 751 in Seattle, with a copy to the Boeing Corporate Labor Relations Office in Seattle.

Upon the expiration of the contract on September 15, 1965, the Union struck and picketed Boeing at Michoud and other locations. The strike was over economic issues between the parties. The strike ended on October 3, 1965 and a new contract was entered into.

During the strike, certain employees who were in the contract unit at Michoud crossed the picket line and worked. At one time during the period of the contract all these employees were members of the Union. Some of these employees had allegedly resigned from the Union prior to returning to work and all of these alleged resignees had taken their steps of alleged resignation prior to any action by the Union against them because of their return to work during the strike. Another group of the returners-to-work during the strike, who were union members, made no attempt to resign from the Union. The Union made no distinction between the two foregoing groups and, after the strike, it proceeded to try and to fine these employees and to institute legal action to collect unsatisfied fines. There is no evidence that before or during the strike the Union warned employees that fines or any other

action would be taken against those who worked during the strike.

Article L, Article XXIV, Section 3, of the constitution of the International Association of Machinists, provides, under the caption, "Improper Conduct of a Member" that:

> The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing as hereinafter provided:
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> * * * *
>
> Refusal or failure to perform any duty or obligation imposed by this constitution; the established policies of the I.A.M.A.W.; the valid decisions and directives of any officer or officers thereof ....
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> * * * *
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under the constitution, without permission.
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> * * * *

Although the internal due process of the steps taken by the Union with respect to the employees aforedescribed, who had worked during the strike, is not in issue, a brief description of the various steps is appropriate. The record indicates that these steps were initiated in November 1965, or possibly the latter part of October, 1965.

By mail, an employee was notified that he had been charged with violating the constitution of the Union, specifically Article XXIV, Article L, Section 3, "Accepting employment ... in an establishment where a strike . . . exists . . . ." He was advised of the time and place of his trial before the Trial Committee and the fact that the charges would be read to him and that he could have an attorney who was "a member of the I.A.M.A.W." to defend him. The Trial, it was stated, would proceed if he did not appear.

According to Higgins, business representative of Lodge 405 during the strike and immediately thereafter, and subsequently president of Lodge 405, those employees who did not appear at their trial were fined $450; those who appeared and were found guilty were fined $450[2]; those, who appeared before the Trial Com-

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[2]There is no evidence that anyone was found not guilty. In addition to the fine, the employee, depending on his years of employment was barred from holding union office for periods of 1 to 5 years. Employee Thomas, a witness called by Respondent, whose fine had been reduced from $450 to 50 percent of earnings, during the strike at Boeing, testified that in September, 1968, about 2 weeks before the instant hearing, as a result of his plea of personal hardship to the union membership and to a new administration in Lodge 405, his fine was reduced to $20.

mittee and said that they were sincerely sorry about what they did and said that they wished to be good union members, had their $450 fines reduced to 50 percent of what they earned by working during the strike.[3] By letter or otherwise, there was no notification to employees by the Union that it had reduced or would reduce the fines to 50 percent of earnings under some circumstances. Higgins states, however, that the foregoing reduction was "general conversation." This appears to be a dubious basis for a factual finding of general knowledge and at best would indicate that some employees, other than those who had actually received such reductions, may have heard of some reductions. Regarding the implementation of the reduction in those cases where it was granted, Higgins states that the Union did not know the earnings of the particular individuals and took their word as to earnings, in arriving at the 50 percent balance.[4]

Some "fleshing out" of Higgins' testimony is to be found in typical letters in the record that were sent by the Union to the employees who were fined. A November 3, 1965 letter, to employees, who had been fined 50 percent of earnings, noted non-payment in full and requested that the employee contact the business representative of the Union regarding payment "since we are now in the process of turning all fines over to our

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[3]This 50 percent policy, according to Higgins, was initiated in the "first part" of 1966.

[4]In letters notifying employees of the fines imposed, the right of appeal to the president of the International Union, pursuant to the constitution, was mentioned. There is no evidence that any appeals were taken.

attorney for collection. Failure to do so could cause your fine to be increased to $450 as was noted at your trial." A letter of February 2, 1966, sent to an employee who had been fined $450, and signed by the Union's attorney, states that the matter has been referred to the attorney for collection.[5] The letter then sets forth a demand for the $450 and advises that failure to respond promptly "will require our filing suit against you, with the additional cost to you of attorney fees and court costs incurred by the Union in the process, plus legal interest."

The record also discloses that the Union cited employees on a petition for money judgment in the City Court of New Orleans. For instance, a citation, dated April 11, 1966, shows the amount as $630 "with legal interest." The figure of $630 was based upon $450 for the fine, plus $180 attorney's fees. Boeing undertook to defend the suits against individual employees but made no general communication of this policy to employees. Thus, the employee cited in the April 11 action, above, contacted Boeing's Labor Relations Manager, Nau, about the citation. Nau referred the employee to the Company's attorney although Nau advised the employee that he could retain his own attorney if he wished.

The Resignations

At an earlier point, one of the categories of employees involved in the instant case was described as al-

[5]The particular letter was sent to Katz who had allegedly resigned from the Union prior to working during the strike.

leged resignees from the Union. It is now appropriate to describe and determine the facts regarding the alleged resignations.

Nau testified that, in 1962, in a period when there was a hiatus in the contractual relationship between the Union and Boeing, that the practice was for union members who wished to resign from the Union to send a registered letter to the Union and to the Company, stating that they wished to resign their membership and to have their dues deduction authorization cancelled. Nau states that in past years, including 1962, this practice was recognized by both parties. Higgins testified that there was no provision in the constitution allowing resignation by sending a letter to the Union and no by-laws or practices of Lodge 405 permitting members to resign their membership. Higgins was then asked by Respondent's counsel about "testimony here by Mr. Nau with respect to an employee who dropped out of membership in Local 405 during a period of time when there was no contract in effect, in 1963."[6] Higgins testified that no employee "dropped" from the Local but Higgins went on to describe some employee who had never been a member in the first place and, from whom, in any event, the Union had never received a letter.

It is the Examiner's opinion that in the past, in 1962, when the Michoud plant was represented by District Lodge 751, the Michoud plant management, the Labor Relations Manager, believed and so advised personnel

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[6]Nau's testimony was as described above.

when such matters arose, that, in a no-contract period, an employee, who wished to resign from the Union and to discontinue authorization for checkoff of dues, could do so by writing to the Company and to District Lodge 751, both in Seattle. The extent to which employees availed themselves of this procedure is unclear but apparently no issue arose between the Company and District Lodge 751[7] on the matter and the Company had no reason to believe that its understanding of the procedure was disputed.

The evidence reveals, in many respects, a general orientation toward Seattle of Company and Union relations at the Michoud plant. This situation arose from the fact that Boeing's corporate labor relations office was in Seattle and that city was also the situs of, and the area embraced by, District Lodge 751. When the 1963-1965 contract was entered into, District Lodge 751 was the union organization representing the Michoud employees. The contract provided in its union security clause that those employees who were not union members and who did not wish to join the Union were obliged to write to the Company in Seattle and to District Lodge 751 in Seattle stating that fact. The Company, in the past, in notices to newly hired employees, set forth the above provisions, including the Seattle addresses of the Company and District Lodge 751. There is no evidence that the contract or the company notices were amended in the above respects after Lodge 405 came into existence at Michoud. Nor is there evidence that, when a new Michoud employee wrote

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[7]Lodge 405 was not yet in existence.

such letters to the Company and to District Lodge 751 in Seattle, Lodge 405 contended that such letters by a Michoud employee were ineffective under the contract because the letters had not been addressed to Lodge 405.

This Seattle orientation was also present in the 1965 period when the events herein involved occurred. Thus, the contract negotiations for the various units, including Michoud, were conducted on the basis of one contract embracing various units and locations.[8] These negotiations were held in Seattle. Also, in 1965, before the strike, Nau advised his labor relations staff people of the Company's position if confronted with inquiries regarding withdrawals from the Union when, by lapse of the contract, there might be no contractual obligation to maintain union membership. This intra-management communication read:

* * * *

1. The Company does not encourage or discourage anyone from withdrawing his membership from the Union ....

2. The Company cannot assure the employees that sending a letter will terminate his membership in the Union. However, in the past, the procedure has been to send a registered or certified letter to the Union and to the Company in Seattle stating he

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[8]The subsequent strike occurred at all locations.

wishes to terminate his membership in the Union and to cancel his payroll authorization for Union dues deductions.
[There are then listed the full name and Seattle address of District Lodge 751 and the name and Seattle address of the Company, to wit, "Corporate Labor Relations Office." Neither the Company's Labor Relations office at the Michoud plant nor Lodge 405 at Michoud were mentioned.]

Around September, 1965, various individual employees at Michoud spoke to their supervisors or other management people about how they could resign from the Union. The evidence reveals that, in substance, they were told that it was necessary to write a registered or certified letter of resignation to the Company and to District Lodge 751 in Seattle. There is no evidence that the Company solicited or initiated withdrawal inquiries or withdrawal action by the employees but the Company did respond to inquiries as aforedescribed.

Beginning about September 16, 1965 and on various succeeding dates in September, over 100 employees wrote, to the Company and to the Union (District Lodge 751) in Seattle, certified or registered letters of resignation. In substance, the writer said that he no longer wished to be a union member or that he was resigning from the Union. By letter of November 4, 1965, Lodge 405 stated to Nau:

> Attached is a list of Boeing employees who wrote certified letters, either to District 751 or Local 405, terminating their membership in the International Association of Machinists and Aerospace Workers. [The list of names attached numbered 235.]

Although we have not yet described Respondent's principal contention regarding the resignations, Respondent does make, in its brief, a subsidiary contention that is, in effect, that assuming, arguendo, that employees could resign from the Union, the resignations should have been addressed to Local 405. In support of this position Respondent states that the Michoud employees "signed Local 405 membership application cards and payroll deductions are made locally."[9] To further present the contention in its full strength, the Examiner will also state that there is no doubt that the Michoud employees were members of Lodge 405 in September, 1965, and not members of District Lodge 751.

While it is probably true that from the standpoint of legal precision, Lodge 405 should have been an addressee for the resignations, the evidence which we

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[9]Before Lodge 405 came into being the Michoud employees signed District Lodge 751 union application cards. Those who had so signed were not thereafter required to sign Lodge 405 cards when that Lodge came into existence. For a time, after Lodge 405 came into existence, District Lodge 751 cards were used at Michoud but this ceased when Lodge 405 became fully functional and had its own cards. The evidence indicates that at one time dues checked off at Michoud were remitted to Seattle but, when Lodge 405 came into being, it received the checked off dues directly from the Company.

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have described above in detail leaves no doubt in our mind of the substantial history of Seattle orientation of union and management matters at Michoud. The contract that was in effect until September 15, 1965 specifically mentioned only the Seattle offices of the Company and the Union, District Lodge 751 in Seattle, as the bodies to be notified if an employee did not wish to join the Union. This and the other factors we have previously mentioned would not unnaturally lead to the belief that the Seattle formula was also applicable to resignations. Also, there can be little doubt of the fact that the Seattle labor relations office of the Company informed its Michoud counterpart of Michoud communications that it received and that a similarly close liaison existed between District Lodge 751, in some respects the ancestor or parent of Lodge 405, and the latter. The letter of November 4, 1965 from Lodge 405 to Nau fully supports the conclusion that Lodge 405 was fully aware of the resignations.[10]

Respondent's basic position is that the resignations were an exercise of futility and that regardless of where or when they were sent or received, Respondent regarded and regards them as having no effect. Charges were filed and trials conducted against those employees who worked during the strike irrespective of resignations.[11]

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[10]The resignation letters addressed to Seattle, were sent to Lodge 405 and received by the latter about October 15, 1965.

[11]Higgins testified that if an employee had sent in a resignation he was not charged and tried if he had not worked during the strike. The converse was also true, that is, the employee who had resigned, was charged and tried, if he had worked during the strike.

The reason advanced by Respondent for disregarding the resignations is, in substance, that there is no provision for voluntary resignations under the constitution or by-laws. The constitution provides that membership may be cancelled where a member is delinquent for 3 months in the payment of dues or special levies. There is also a constitutional provision for honorary withdrawal cards to a member who ceases working at the trade or who becomes a supervisor. Higgins testified that the union position at the time of the purported resignations was that the employees did not have the right to resign from the Union.[12] This continues to be the union position.

The Allis-Chalmers Decision[13] and Reasonable Fines

The applicability of the Allis-Chalmers decision to the present case is apparent, but, preliminarily, it is appropriate to describe and to understand the holding in that case since the doctrine of unreasonable fines, which is advanced by the General Counsel in the instant case, is distilled from the Allis-Chalmers decision.

The majority of the Supreme Court held, in substance, that "the body of Section 8(b)(1)[(A)] [which prohibits restraint or coercion by a union of the rights of employees to engage in or to refrain from

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[12]Higgins referred to the constitutional provisions above and the absence of any provision for resignation. Higgins did, however, testify that a member could resign "by death."

[13]*N.L.R.B. v. Allis-Chalmers Manufacturing Company*, 388 U.S. 194 (1967).

engaging in union activities as guaranteed in Section 7 of the Act]" does not proscribe "the imposition of fines and attempts at court enforcement . . . ."[14] The Court stated: "Our conclusion that Section 8(b)(1)(A) does not prohibit the locals' action [of imposition of fines and court action to collect the fines] makes it unnecessary to pass on the Board holding that the proviso protected such action."[15] The critical role of court enforcement of fines as a significant factor in appraising the union conduct, and a further indication of the non-determinative role of the proviso in the majority's decision, is found in the comment regarding the fact that one of the local unions in Allis-Chalmers had notified strikebreaking employees that they might be subject to a $100 fine for each day they worked. The Court said that "... no inference can be drawn from that notification that court enforcement would be the means of collection. Therefore, at least under the proviso, if not the body of Section 8(b)(1), such notification would not be an unfair labor practice." At another point, it is said that "Assuming that the proviso cannot

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[14]In reaching this conclusion, the majority had perceived "inherent imprecision" in the words "restrain or coerce" in Section 8(b)(1)(A) and, in its view of the legislative history, Congress did not intend to interdict, as "restraint or coercion" the imposition of fines and court enforcement thereof. The majority also stated that "weak" unions would be disadvantaged if court enforcement of fines were encompassed in the prohibition of Section 8(b)(1)(A) and that therefore it had not been intended to interdict such conduct.

[15]Immediately following the body Section 8(b)(1)(A), described above, is the proviso "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

also be read to authorize court enforcement of fines, a question we need not reach . . . ."[16]

In upholding the imposition of fines and the court enforcement thereof, the Court, in the course of its opinion, at several points used the term "reasonable fine." Thus, at page 183: "Where the Union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine"; at page 192: "There may be concern that court enforcement may permit the collection of unreasonably large fines. However, even were there is evidence that Congress shared this concern, this would not justify reading the Act also to bar court enforcement of reasonable fines." In a footnote on the same page it is stated that "It is not argued that the fines for which court enforcement was actually sought were unreasonably large."

Accordingly, we find an implied requirement that the court enforceable fine must be "reasonable" or not "unreasonably large." Having rejected the position that the high water mark of internal union discipline of members regarding fines or other strictures was the right of expulsion from membership, what remained was the conclusion that a union could fine its members and enforce the fines in court without violating Section 8(b)(1)(A). Since the Act, under the foregoing construction, supplied no standard or limitation on the amount of the fines, the standard of reasonable-

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[16]Elsewhere the Court did perceive "cogent support" for its interpretation of the body of Section 8(b)(1)(A) in the proviso.

ness, often invoked in legal construction, was apparently invoked as appears from the above excerpts in the Allis-Chalmers decision.

We proceed, therefore, on the basis, as indicated by the Court, that under the body of Section 8(b)(1)(A) the fine imposed and enforced or sought to be enforced must be "reasonable."

The principal or sole point of reference in Allis-Chalmers to determine what is a reasonable fine or one that is not "unreasonably large" is the actual amount and circumstance of the fines in that case. The factual circumstances are most fully described in the Trial Examiner's decision, adopted by the Board, and not disputed in the Court of Appeals or in the Supreme Court.[17]

In Allis-Chalmers, Local 248 struck the Company from February 2 through April 20, 1959. On February 24, 1959, 248 notified employees who had crossed the picket line to work that they were subject to a fine of up to $100 per day for each day's activity. Between February 2 and June 30, 1959 charges were filed with 248 against the strikebreakers. By September, 1959, 172 members had been fined $20 to $100. On September 18, 1959, 248 demanded payment of the fines. On October 16, 1960, 248 again asked for payment, citing a

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[17]Local 248, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, and *Allis-Chalmers Manufacturing Company*, 149 NLRB 67, 75-76; *Allis-Chalmers Manufacturing Company* v. *N.L.R.B.*, 258 F.2d 656, 657 (C.A. 7); *N.L.R.B.* v. *Allis-Chalmers Manufacturing Company*, 388 U.S. 194, 192, ft.n. 30.

Wisconsin case holding that fines were enforceable. On April 21, 1961 248 notified each fined member of the action of the U. S. Supreme Court in the Wisconsin case and warned that a continued failure to pay the fines would result in the case being turned over to counsel "for civil suit." Local 401 struck at another installation of the Company from February 2 to April 19, 1959. After trial, it fined strikebreakers $100 each on July 11, 1959. On August 29, 1961, 248 took a pilot case to court against a strikebreaker who had been fined $100. Plaintiff was successful on April 26, 1963. Appeal was pending. A suit by 401 against one of its strikebreakers was pending. In 1962, both 248 and 401 had a similar situation as described in earlier years. In 1962, the actions of the Unions were similar to their earlier actions and strikebreakers were fined $35 to $100 by 248 and 401 fined its strikebreakers $100. In 1962, however, there were no threats of court enforcement nor warnings of court action. A high percentage of 248 strikebreakers paid fines in 1962 and all 401 strikebreakers paid.

Aside from initial general descriptions of the factual situation in the case, the Allis-Chalmers decision devotes little space to factual details but is principally concerned with the broad legal issues of the case. Perhaps the most specific comment made by the Court about the actual fines in Allis-Chalmers is as follows:[18]

> The notification by Local 248 to its strikebreaking employees that each day they continued to

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[18]Page 192, ft.n. 30.

work might constitute a separate offense punishable by a fine of $100 was sent only to members of Local 248, not those of Local 401, and only during one of the two strikes called by Local 248. The notification was sent only to those employees who had already decided to work during the strike. Most important, no inference can be drawn from that notification that court enforcement would be the means of collection. Therefore, at least under the proviso, if not the body of Section 8(b) (1), such notification would not be an unfair labor practice. It is not argued that the fines for which court enforcement was actually sought were unreasonably large.

An appraisal of the factual situation in Allis-Chalmers sheds little light upon what standards the conclusion was reached, as it quite apparently was, that the fines were reasonable or not unreasonably large. All we know is that, in that case, fines of $20 and $100 on strikebreakers, who worked during two strikes that lasted over two months each, was reasonable. We do not know if the Court would regard the actual imposition, as threatened in Allis-Chalmers, of a fine of $100 per day for each strikebreaker, as reasonable. It is this lack of a standard or guideline in determining reasonableness that presents a problem. And this is a problem that may arise in every case involving fines and threatened or actual court enforcement of the fines. We can conclude that, in those cases that arise where the striker lasts more than 2 but less than 3 months and the fine is $20 or $100, the fine is reason-

able.[19] But suppose the fine is $150, $200, $300, $400 or some other figure for a strike of similar duration. What is the standard in a one month strike, a six month strike or a strike of some other duration. In this connection, the basic nature of the problem was recognized by the dissenting justices in Allis-Chalmers in the following observations (page 204):

> In this case, each strikebreaking employee was fined from $20 to $100, and the Union initiated a 'test case' in state court to collect the fines. In notifying the employees of the charges against them, however, the Union warned them that each day they crossed the picket line ... might be considered a separate offense punishable by a fine of $100. In several of the cases, the strikes lasted for many months. Thus, although the Union here imposed minimal fines for the purpose of its 'test case', it is not too difficult to imagine a case where the fines will be so large that the threat of their imposition will absolutely restrain employees from going to work d u r i n g a strike ... of course, as the Court suggests, he [the fined employee] might be able to defeat the union's attempt at judicial enforcement of the fine by showing it was 'unreasonable' . . . . but few employees would have the courage or the

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[19]To be on all fours with Allis-Chalmers, the comparative strike situation must also include a warning of fines to individual strikebreakers during the course of the strike and not deferment of threats of, or imposition of, fines until after the strike.

financial means to be willing to take that risk (citation omitted)."[20]

In his brief, the General Counsel, recognizing, at least in some degree, the decisional task of determining what is a reasonable fine, states that "Since neither the Board nor Courts have established any criteria in this type case for determining what constitutes a reasonable fine, all relevant factors should be considered." We would agree with this observation although the "relevant factors" are almost as recondite as what is "reasonable" since the Court has not informed us what are the hallmarks of reasonableness. If we knew even one standard of reasonableness as to the Allis-Chalmers fines, the relevant factors therein could be determined. All that can be said is that in that case, where strikebreakers worked about 2½ months and earned possibly between $2.50 and $3 per hour, or possibly $1,000, overall, whereas if they had not worked as required by the union rules they would have earned nothing or would have received possibly appreciably less in strike benefits, a fine of $100 or

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[20]Aside from these observations, the contests, of whether particular fines in particular strikes of various types and duration are unreasonable or not, could find their way individually to the Board. Without a standard by which to determine reasonableness, this task could be formidable. Conceivably, the administrative task could be lessened by deciding that almost any duly enacted fine, short of outright confiscation, was reasonable but leaving to a patchwork of state court decisions the determination of whether the particular court would actually enforce a fine that it might consider unreasonable or excessive. Surely this approach cannot be recommended as the lot of individual employees covered by Section 7 of the Act and by Section 8(b)(1)(A) even as the latter has been interpreted in Allis-Chalmers.

$20 and court action thereon is reasonable. But, again, at the risk of belaboring the point, what is reasonable if the fine was some other amount or if the strike was of different duration.[21]

The various factors, submitted by the General Counsel as relevant in assessing the reasonableness of the fines in the instant case and as supporting his contention that the fines were unreasonable and excessive, are as follows:

The General Counsel cites Section 8(b)(5) of the Act. This section provides that it is an unfair labor practice for a union, in situations where a contract requires union membership as a condition of employment, to require payment of a membership initiation fee in an amount "which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

It is therefore argued, in effect, that the wages of the strikebreakers and other economic factors pertaining to them should, by analogy to the factors deemed

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[21]We mention amount of the fine and duration of the strike because these were the only factual elements that appear in Allis-Chalmers. The Court evidenced no interest in any other factors and did not comment specifically on either factor that was present other than to observe that no one had argued that the fines were unreasonably large. As we shall see, there are other considerations that have at least potential relevance on the question of what is a reasonable fine.

relevant in Section 8(b)(5), be considered in the instant case.

While we do not have a Section 8(b)(5) situation before us[22] and cannot say that the standards set forth in that section govern the instant case, the considerations in that section, and in the decisions applying it, do manifest, in some degree, congressional, Board, and court thinking on the matter of unreasonable or excessive union fees. An initiation fee and a fine are of course distinguishable but both represent an exercise of union power as to membership obligations of employees; and regarding the initiation fees, at least, we have some guidelines by which a fee is judged reasonable or excessive.

The employees involved in the instant case normally earned approximately $2.38 to $3.63 per hour which would mean about $95 and $145 per 40 hour week, respectively. The fines were $450, although under certain conditions described earlier in this decision, individual strikebreakers had obtained a reduction from the $450 fine to a fine in the amount of 50 percent of the strikebreaker's earnings at Boeing during the strike.[23]

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[22]Fairly typical Section 8(b)(5) cases are: *Television and Radio Broadcast and Studio Employees, Local 804 . . . (Triangle Publications, Inc.)*, 135 NLRB 632, enforced 315 F. 2d 398 (C.A. 3); *Local 839, Motion Picture Screen Cartoonists (I.A.T.S.E.)*, 121 NLRB 1196.

[23]Atypical and not properly part of the general picture of the amount of the fines, is the case of a strikebreaker who, in 1968, two weeks before the instant hearing, secured a reduction in his fine to $20., *supra*.

It is pointed out by the General Counsel that the $450 fine alone, even without the $180 attorney's fee for a total of $630, is more than 4½ times the weekly earnings of the lowest paid strikebreakers.[24] We ourselves likewise observe that $450 is more than double the weekly earnings of the highest paid strikebreaker. The General Counsel aslo characterizes $450 as "exorbitant" when compared with the union's initiation fee of $10 and the monthly dues of $5.50 or $66 per year.

Another factor that the General Counsel urges as supporting the contention that the fines were unreasonable is the fact that Hurricane Betsy had struck the New Orleans area a week before the strike. The hurricane caused extensive damage in the area, affecting, among others, the employees, their homes, families, possessions, and transportation. The record does not show how much each individual strikebreaker, over 160 in number, was affected by the hurricane nor how the more than 10 times as many employees who did not work during the strike were affected. There is testimony from a few strikebreakers as to how they were affected by the hurricane.[25] In some degree the testimony may be regarded as illustrative of the type

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[24] In using the term "strikebreakers" to describe employees who worked during the strike, no value judgment is intended. We use the term simply as a convenient one word description rather than the longer phrase of "employees who worked during the strike." Both the majority and the dissenting opinions of the Supreme Court in Allis-Chalmers used the term "strikebreaking employees" in referring to those who worked during the strike.

[25] For instance, 30 inches of floodwater in the home, destruction of lifetime possessions and property, large family in stringent financial straits for basic necessities.

of problems that beset people in the area, including strikebreakers and non-strikebreakers. Undoubtedly some people suffered more and some less but unless an individual survey was made of some 1500-1900 employees in the unit, we can do little more than conclude that the hurricane adversely affected the area and its people from the economic standpoint.

In the same connection, the record shows that the Michoud plant was severely damaged by the hurricane and was closed for 3 or 4 days, reopening just a matter of a few days before the strike. Nau had spoken to Higgins with regard to the impending multi-unit strike by the Union against Boeing. Nau urged that, in view of the effect of the hurricane on the Michoud plant and its employees, Higgins should request the International Union to exclude the Michoud plant from the coming strike against the various Boeing installations. Higgins responded negatively.

Higgins testified that the Union did take the hurricane situation into consideration regarding the fines. He states that he personally had thought that the fines should be more than $450 because he believed some strikebreakers had earned more than $450 by working during the strike. The reduction of the $450 fines to 50 percent of earnings during the strike was attributed by Higgins to consideration of the effects of the hurricane on employees. We believe that this may be partially true but the reduction was due to other factors also and the reduction did not apply ipso facto simply on the basis that all strikebreakers had been affected by the hurricane. Thus, as earlier, described, the re-

duction of the $450 fine, to the 50 percent of earnings basis, was not accorded to all strikebreakers but only to those who appeared at their trial, confessed their wrongdoing, and affirmed a desire to be good union members in the future. No notice was issued that the above formula was being followed or would be followed.[28]

We have before us, therefore, a variety of factors that, the General Counsel asserts, demonstrate that the fines in the instant case were unreasonable. These factors include the amount of the normal earnings of the employees and the normal dues and initiation fees, as well as the severe economic consequences of a hurricane that struck the area shortly before the strike.

It is our opinion that normal earnings and the amount of the regular dues and initiation fees are relevant considerations. The normal earnings are particularly important in a situation, such as here, where the charges and fines did not occur until after the strike and where there were no prior warning of a specific fine for working during the Michoud strike or of the

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[28]Both the Union and the Company had taken steps to relieve suffering caused by the hurricane. Upon application by an individual and after investigation, a special fund set up by the International Union was the source of payments of $124 to employees who were seriously affected by the hurricane. Thomas, a witness called by the Union, who was a strikebreaker, testified about there being 30 inches of water in his house as a result of the hurricane and about he and his wife and eight children sleeping on the floor of his uncle's apartment, occupied by his uncle's own large family. Thomas applied to the Union for the $124 relief and his uncontroverted testimony is that Higgins told him he was not eligible since he worked during the strike.

possible amount of the fine.[27] It is apparent that such fines will probably have to be paid from normal earnings and that whatever earnings there were during the strike were probably spent as normal living expenses, without saving part thereof for an expected future fine of $450.

From the standpoint of the Union, however, a more important consideration would be that the strikebreakers received earnings during the strike. These earnings were received as a result of violating membership obligations not to work during the strike and the strikebreakers' earnings are in contrast to the lack of earnings of the loyal union members.[28] It is thus apparent that both normal earnings and earnings secured during the strike are relevant considerations in evaluating the reasonableness of the fines.

As to normal dues and initiation fees of the Union, they, like normal earnings, have relevance because they are indicative of the amount of the economic obligations that normally exist between the Union and its members. For dues of $5.50 per month or $66.00 per year, the normal financial obligation of a member to

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[27] Respondent, moreover, had never before fined any of its members.

[28] The strike occurred through 18 calendar days, including 3 Saturdays and 3 Sundays. Different strikebreakers, of course, had different rates of pay and worked either a few days or many days during the strike. As provided in the expired contract, bonus or premium rates were earned by some employees for weekend work or for work properly classed as overtime. Varying pay rates, lesser or greater days worked, plus the existence or non-existence of premium pay in individual cases, would give a wide range of earnings.

the Union is discharged. From such a standpoint, a fine of $450 is a major escalation in financial obligation.

Then we come to the economic consequences of the hurricane and the attendant economic and personal pressures therefrom that had been placed upon individuals who worked during the strike. The difficulty of assessment in this area as to relevance on the amount of the fines is apparent. In promulgating or administering a penalty where a large number of individuals is involved there are two somewhat conflicting considerations. One consideration is a desire for uniformity in order to avoid contentions of partiality but another consideration is the desire to assess guilt on an individual rather than on a group basis. Uniformity also makes for ease of administration as contrasted with the time and difficulty entailed in arriving at varying individual penalties. Does a reasonable fine in the instant case necessitate a differentiation between two strikebreakers, one with three children and one with eight. Suppose one strikebreaker had a dependent mother-in-law and a spastic child requiring special medical attention. Should the fine be different for a man who had 30 inches of water in his house whereas another had only 2 inches. All sorts of differentiations are possible, including values of destroyed or damaged cars, furniture, and so forth that varied in individual case; children or no children; working wives or nonworking wives and many types and degrees of individual financial obligations. How is the adjudication in any of the foregoing types of situations of strikebreakers to be affected if the nonstrikebreakers had equivalent or greater numbers of children, personal problems, and damage to property.

Perhaps a conclusionary and determinative assessment of the various factors of normal earnings, initiation fees, dues, strike earnings, hurricane, individual situations of strikebreakers, as guidelines to what is a reasonable fine, is not necessary. None of these elements were presented to the Court in Allis-Chalmers and as far as appears the Court evinced no interest in such real or potential factors in arriving implicitly at its conclusion that the fines in that case were reasonable or not unreasonably large. It can be said that since the fines in Allis-Chalmers were $20 and $100 for working during a 2½ month strike, the instant fines of $450 for working during an 18 day strike were unreasonable. It can also be said that in the cited case there was ample advance warning not only that strikebreakers would be fined but also that the fines could be severe.[29] In the instant case there was no warning before or during the strike that fines would be imposed and, of course, no indication of the amount or severity of the fines.

While the foregoing approach is temptingly available, the Examiner believes that the parties, as well as other employees, unions, and employers, are entitled to some explication of what are the elements that make one fine in one strike reasonable and which factors in another strike might make certain fines unreasonable. It scarcely is helpful or enlightening to conclude that only a $20 or $100 fine is reasonable regardless of the length of the strike and regardless of other

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[29]At one point the Allis-Chalmers strikebreakers had been notified that their activities could subject them to a fine of $100 per day worked.

factors that we have touched upon above. A fine of $100 in a one day strike and a fine in the same amount for working during an 8 month strike are surely not the same as to reasonableness even if we disregard every other variable factor.

A determination of whether the instant fines are reasonable or unreasonable should itself be based on a formula that has a reasonable basis. The reasonableness of the basis or standard will be the more evident if it is reasonable not only with respect to the instant case but has general applicability to other strikes and to other strikebreakers. A measure of predictability in such situations would certainly be of help to employees, unions, employers, to the General Counsel of the Board, and to those charged with adjudicatory responsibilities. While Allis-Chalmers may have decided reasonableness in that case, the lack of explication of any basis for the conclusion limits its general applicability as a guideline.

A fine by its nature and definition is a punishment. Punishment has the elements of retribution, deterrence, prevention and reformation. The latter three elements are generally accorded greater weight in our contemporary society than is retribution in dealing with non-conformity or wrongdoing in the various facets of human conduct. In a regulatory and remedial statute such as the Act the sanctions are not punitive or retributive in nature. We therefore are of the opinion that while the Supreme Court found that the Act vested in a labor organization the protected right under the Act to impose reasonable fines and to seek court en-

forcement thereof, it was not intended, we believe, that such fines should be punitive or retributive. This conclusion, in some degree, finds confirmation in the fact that the Court used the term "reasonable" in connection with fines.[30]

Since we believe that the fines with which we are concerned should be essentially deterrent in nature, the question is, how much deterrence. A deterrent can be total or virtually total or it can be partial or less than total. Without reference to larger fines, it would appear that a fine of $100 per day and court enforcement thereof on a strikebreaker, earning average industrial wages, is a total deterrent to any union member working during the strike. We also believe that a fine in the total amount of what the strikebreaker earned by working during the strike is a total deterrent.[31] There can be a variety of fines that are less, in effect, than total deterrents but are nevertheless deterrents in varying degrees. Probably fines in amounts of more than 50 percent of earnings during a strike but less than 100 percent are also total deterrents for all practical purposes. This is most evident if the percentages exacted are 80 or 90 percent. The

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[30]It is probably true that a punishment such as a fine may have an inherent punitive element. The deterrent factor, however, is properly predominant as contrasted with the situation where far and beyond any reasonable deterrent, it is evident that a punitive result is being imposed.

[31]Employees who are warned before or during the strike of fines of the two aforementioned types would normally not work, especially if there had been a few test cases with such court awards staring them in the face. Such fines, if imposed after the strike, without prior warning, would deter working in any future strikes.

more difficult question arises when the percentage is 50 percent or some percentage above or below that figure.

Before endeavoring to discern whether the Supreme Court was speaking of a reasonable fine in terms of total or partial deterrence, it should be made clear that the Examiner believes that the Allis-Chalmers doctrine of reasonable fine is most appropriately interpreted in terms of the relationship of the amount of the fine to the earnings of the strikebreakers during the strike. We believe that such a standard, given the Allis-Chalmers decision regarding the right to impose and to collect fines in court, is basically equitable. The elements of normal earnings in non-strike periods, the amount of initiation fees and dues and other factors, are taken into consideration in determining what percentage of strike earnings may be assessed by fine. If the percentage of earnings during a strike, that can be properly extracted by a fine, can be determined by some equitable standard, then we are prepared to submit such a fine as being the reasonable fine contemplated by the Court in Allis-Chalmers. Further, if such a standard or formula can be evolved it would be readily understandable by employees, unions, employers and all other concerned parties interested in their respective rights and obligations in this matter of fines.

Having previously narrowed the nature of the fines that concern us to fines that are deterrents, we return to our consideration of whether the deterrence envisaged by the Court was total deterrence from any work

during the strike or less than total deterrence. The resolution of this matter is initially essential since if the Court was sanctioning total deterrence then a fine of 100 percent of total strike earnings might be the reasonable fine envisaged, with any greater amount of fine being unreasonable. Conversely, if the Court did not contemplate total deterrence, our problem is to ascertain the percentage of earnings extracted by fine that equates with the degree of partial deterrence that the Court would consider reasonable.

An important portion of the reasoning of the majority of the Court in reaching its basic decision in Allis-Chalmers was the strong and weak union analogy. Thus,

> It is no answer that the proviso to Section 8(b)(1)(A) preserves to the Union the power to expel the offending member. Where the Union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a reasonable fine. Where the Union is weak, and membership therefore of little value, the Union faced with further depletion of its ranks may have no choice except to condone the member's disobedience [unless it can impose fines and enforce them in court]

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> At the very least it can be said that the proviso preserves the rights of unions to impose fines as a lesser penalty than expulsion ...
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> ... to interpret the body of Section 8(b)(1) [as applying to the imposition and collection of fines but not to expulsion would be making] a distinction between court enforcement and expulsion [which would have been anomalous ... such a distinction would visit upon a member of a strong union a potentially more severe punishment than court enforcement of fines, while impairing the bargaining facility of a weak union by requiring it either to condone misconduct or deplete its ranks.

The concurring opinion of Mr. Justice White who constituted the fifth member of the court majority is based almost exclusively on the strong and weak union reasoning, above, in Mr. Justice Brennan's majority opinion. The same reasoning was also the subject of critical comment in the dissenting opinion written by Mr. Justice Black and concurred in by three other justices.

Our attention to the strong and weak union comments of the Court is based on our interest in the question of whether they tell us anything about the Court's views on deterrence. Evidently the Court views a "strong" union as one that possesses a deterrent power over its members that a "weak" union does not possess. A strong union, according to the court,

is one whose membership the members view as "valuable" and therefore expulsion is a more severe penalty than court enforcement of fines. A weak union is one where membership is of "little value" to the members and therefore expulsion is no deterrent.

If, as the Court states, expulsion from a strong union is a more severe penalty than a court enforced fine, then such expulsion or power to expel by a strong union is probably equivalent to total deterrence. In other words, when the strong union, of which the court speaks, strikes an employer, the union members will not work because the Union cannot only fine strikebreakers and enforce the fine in court but can, if it chooses, impose the greater penalty of expulsion from membership. If expulsion is a greater penalty than the court enforced fines then the loss of membership can probably be presumed to be a greater economic loss to the member than would a court enforced fine. It is doubtful that in the majority of cases unadulterated loyalty to the Union or sentimental attachment to the concept of membership is the element that makes loss of membership a greater penalty than a court enforced fine. Moreover, the Court in describing a strong union as one where the membership was "valuable" was using a term not generally used to describe pure loyalty or sentiment. The Court, in the same sense, described a weak union as one whose membership was of "little value." Nothing was said about comparative loyalty of members in different unions but the comparative description was solely in terms of the value of the memberships. Perhaps it may be said that the aforementioned strong union in a plant, since it would

have secured better contract terms than would a weak union, was in that sense the Union whose membership was more valuable. This is true to some degree but the same beneficial contract terms would continue to accrue to the member expelled for strikebreaking so that expulsion, realistically, in such a situation, would not be a penalty that was greater than a court enforced fine.

It is reasonably apparent, in our opinion, that the strong union, membership in which is so valuable that expulsion therefrom is a greater penalty than court enforced fines, is most likely a craft union in an industry where membership in that union is essential to secure or to retain employment.[32] Expulsion from membership is therefore a severe penalty and greater than court enforced fines. In such situations a high degree of discipline is possible and there is little or no strikebreaking activities by members. We there-

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[32]The efforts of minority groups to secure membership in certain unions is explainable primarily on the ground that employment in certain trades is not a practical possibility without union membership in specific unions. There are two aspects of the foregoing. One is the problem of the untrained and inexperienced to gain admission to the union apprenticeship program and then to become full-pledged journeymen. The other is that of a trained and experienced worker to gain union membership since membership is as essential to him as to the untrained. Under the Act, of course, membership in a union cannot be required as a condition of securing employment and in a union security contract retention of employment may not be dependent on union membership if that membership was denied or terminated on some ground other than the non-payment of initiation fees and dues. Legally, therefore, expulsion from union membership for anything except non-payment of dues is difficult to describe as a penalty more severe than court enforced fines.

fore conclude that expulsion from a strong union, which the Court described as a greater penalty than court enforced fines, is, for all practical purposes, equivalent to total deterrence to strikebreaking activity by members. The question then is, did the Court, while, in effect, recognizing that expulsion from a strong union was an exercise of total deterrence, intend or contemplate that a reasonable fine was one, the amount of which would totally deter strikebreaking, for instance, a fine of $100 per day. Or was a reasonable fine to be a fine that would deter strikebreaking but not totally eliminate any possibility that any member could, as a practical matter, work during a strike.

For several reasons, it is our opinion that the Court contemplated that a reasonable fine was one that would be less than a total deterrent to working during a strike. As we have seen, the expulsion of a member from a strong union is, in effect, total deterrence to strikebreaking or any other internal rule violation. But the Court, recognizing the aforementioned power of the strong union, said that the strong union could impose a lesser penalty than expulsion, to wit, fines and court enforcement thereof. By the same token, it was concluded that the weak union could seek court enforcement of fines because this was a lesser penalty than expulsion. Since expulsion by a strong union is equivalent to total deterrence and since the Court referred to court enforcement of fines, as a lesser penalty than expulsion, then a reasonable fine, enforceable in court, should not be so large in amount that it is equal to total deterrence. If this is not so, court en-

forced fines are not lesser penalties than expulsion by a strong union.

Another reason, for believing that a reasonable fine is one that is less than a total deterrent to any union member working during a strike, is the fact that, under the Act, the right to strike and to shut down the employer's operation is not unlimited. The Supreme Court has held that during an economic strike an employer has a right to protect and carry on his business by hiring permanent replacements for the strikers.[33]

In a less developed period of industry where a relatively high proportion of work was unskilled, the employer might effectively exercise his right to try to carry on his business by hiring people off the street, who had no particular skill or experience in the employer's operation. The employer could, of course, also employ striking employees who returned to work during the strike but, even if all strikers remained on strike, the employer still could resort to hiring replacements off the street. Today, to a great extent, many employers, including probably Boeing at the Michoud plant, could not operate in any degree, in a strike, as allowed by the Mackay decision, if all the regular experienced employees were subject to court enforced fines so large in amount that total deterrence would exist as to any union employee who might, for his own

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[33] *N.L.R.B. v. Mackay Radio & Telephone Co.*, 304 U.S. 333. In effect, this principle rejects the contention that the employer, by hiring strikebreakers, and thereby carrying on his business during a strike, is interfering with the right to strike, particularly since replaced strikers may lose their jobs.

reasons, wish to work. It is one thing for a union and its members, through loyalty, dedication, conviction and solidarity, to strike and to voluntarily remain on strike and thereby exert maximum economic pressure by closing down a plant completely, but it is another thing to obliterate all aspects of individual freedom by court enforced fines of a private organization when the fines are so large in amount that no member could work. Section 7 and Section 8(b)(1)(A) of the Act underwent some attenuation in Allis-Chalmers but it is doubtful that they disappeared completely. If there is one thing reasonably clear regarding the enactment of Section 8(b) of the Act in 1947, it is that the Section was intended to prevent a union from affecting the employment of employees except in the narrow area of non-payment of dues under a union shop contract. A fine that is so great that it is an absolute deterrent to working prevents an employee from working and deprives him of employment. Again, if the fine is *per se* a total deterrent then we have total deterrence and this result is inconsistent with the court's definition of a reasonable fine as a lesser penalty than expulsion by a strong union, the expulsion being, as previously described, equivalent to total deterrence.

A further consideration in reaching the conclusion that a reasonable fine is less than a total deterrent is the nature of a union and its relationship to employee members. The union's strength, except in a non-free society, ultimately and in the long run, depends on the voluntary support and loyalty of its members. The objective of fines or other discipline would seem to properly be the rehabilitation of recalcitrant members

into loyal members rather than further or complete alienation of the recalcitrants. The good and the bad members of the Union will continue to be employees in the plant represented by the Union. A reasonable fine, imposed on strikebreakers, that deters such activity, would appear more consonant with the term reasonable fine as used by the Supreme Court than would a fine so large in amount, accompanied by court enforcement and costs, that it is a total deterrent which quite possibly could completely alienate the member from any voluntary cooperation with, or support of, the Union thereafter.

As previously stated it is our opinion, that a reasonable fine, in the context in which we are considering the term, should be based on a relationship of the fine to the strikebreaker's earnings during the strike. We have rejected, for reasons stated, total deterrence as compatible with a reasonable fine. This would eliminate a fine that is equivalent to 100 percent of earnings during a strike and it would eliminate any fine in a greater amount than such total earnings. The reasonable fine is, we believe, equitably and conveniently defined as a percentage of the strikebreaker's earnings, where the percentage of the earnings encompassed by the fine is large enough to deter the normal employee from violating his obligation as a union member to refrain from working during a duly authorized strike, but not so large that it completely eliminates, as a practical matter, all freedom of choice on the part of the employee to exercise some measure of individual freedom as guaranteed under Section 7 and 8(b)(1)(A) of the Act.

Governed as we are by the Allis-Chalmers decision, it is apparent from the decision that a reasonable fine in the Court's contemplation was to be more than a token demonstration that the Union could impose some court enforced fine. The Court's focus on the situation of a "weak union makes it clear that the court enforced fine was to be a genuine deterrence to strikebreaking although, as we have previously stated, less than an absolute deterrence.

It is apparent that the choice of some specific percentage of earnings as being the reasonable fine contemplated by the Court will appear to be an arbitrary choice and, in a sense, the charge will be correct. But this is true of all line drawing. The Board requires a 30 percent showing of interest by a petitioning union before it will process a petition for certification as collective bargaining agent. The percentage is 30, not 29, 25, 31, 35 or some other figure. Individuals attain majority at 21, not 20 years and 6 months or at some other age. Voters must reside in a jurisdiction for 30 day, 3 months, 6 months or some other period before they may exercise their franchise.

It is the Examiner's opinion that a fine of 35 percent or less of a strikebreaker's earnings at his regular straight time rate is, presumptively, a reasonable fine. We also believe that a fine of 80 percent or less of overtime or premium pay, earned by a strikebreaker, which he would not normally have earned but for the fact that his fellow union members were engaged in an authorized strike, presumptively, is a reasonable fine. We believe that a total fine embracing some earn-

ings at the 35 percent or less rate and some earnings at the 80 percent or less rate is, presumptively, a reasonable fine.

The 35 percent or less rate on regular earnings is, in our opinion, an effective deterrence but not a total deterrence. If a strikebreaker's rate is $3 per hour and he works 5 days, 8 hours a day for 40 hours, his gross earnings are $120. Assume his normal deductions leave him $100 net pay. A fine of 35 percent on $120 in earnings is $42. His net take home pay is therefore $58. Taxes and other deductions will have been paid on the entire $120 he earned. His take home pay of $58 is equivalent to $1.45 per hour or less than half his normal rate and less than the Federal minimum wage. His normal working expenses of transportation to and from the job, lunch, and work clothes would continue, of course, and would have to be paid out of his $58 take home pay. It is one thing to bear the foregoing expenses when the take home pay is $100 but it is something else when the same expenses are borne by $58 in take home pay.[34] It is also to be observed that the reality of all the foregoing factors would be evident whether there is specific warning of the fine before the commencement of the strike or whether the fine is imposed during the strike or after the strike. The financial impact might well be greatest where, without prior specific warning, the fine is imposed after the strike. In such situations the average

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[34]Using the same figures as above but assuming a fine of 50 percent of earnings instead of 35 percent, we have the following: Take home pay of $100 after normal deductions; 50 percent fine on $120 earnings or $60; net take home pay is $40, equivalent to $1 per hour.

strikebreaker would probably have used all or most of his earnings to meet day to day needs of himself and his family without making provision for payment of a fine. His normal earnings would therefore be important.

An additional element that is relevant in establishing what constitutes a reasonable fine is the fact that in addition to the fine, the strikebreaker, during and after the strike, is usually subjected to considerable pressure by his fellow employees who remained on strike. Scornful epithets and remarks as well as alienation from friends or acquaintances both at work and in the community can be some of the pressures which the strikebreaker may incur. These pressures are not to be underestimated. The combination of such pressures or the prospect of such pressures when combined with the warning of, or the actuality of, a court enforceable fine of 35 percent or less of strikebreaker earnings, in our opinion, constitute a genuine deterrence. In the illustration which we gave previously, the employee might well conclude that the $58 a week to be garnered by going to work during the strike was not worth the candle.

We therefore have little doubt that the formula regarding fines that we have described above and which we propose to apply herein is a genuine deterrence and that a maximum in excess of 35 percent of earnings would tip the scale in the direction of total deterrence, a result not compatible, as we have explained, with the concept of a reasonable fine.

The next aspect of the formula to be considered is whether a 35 percent maximum is itself too much of a deterrence and too close to total deterrence. We would answer in the negative. Despite the fact that the formula provides a real deterrence, the individual employee could decide, in the illustration we gave, that while $58 in pay was not much for a week's work, it was to him and his family better than being at home or on a picket line with no earnings. Individual circumstances would undoubtedly enter into the decision. If the individual was convinced that he did not agree with the merits of the issue over which the strike had been called, this could be a factor in his decision. If the needs of a man's family were acute, this could be a factor. A man with substantial seniority might be concerned that he might be permanently replaced by the employer if he remained on strike. In some individual cases, various factors or a combination thereof might be enough to persuade the individual that the reasons for working were greater than the deterrence. In other cases, the deterrence to going back to work would prevail. And it is this kind of a picture, which we believe is reasonably accurate, that illustrates the difference between a partial, though genuine, deterrence and a total deterrence. We further believe that such a deterrence comports with the concept of a reasonable fine and that the formula described for fixing the fine is calculated to result in the aforementioned reasonable fine.

In stating what we considered to be the standards of a reasonable fine we used two figures. One figure was up to 35 percent of earnings of the strikebreaker which he earned at his regular rate of pay for his nor-

mal work day. The other figure was up to 80 percent of earnings of the strikebreaker earned at premium pay which normally he would not have earned but for the strike. The differentiation is based on the following considerations. There is, as we have seen, a combination of rights and interests that are to be balanced as equitably as possible in implementing the Allis-Chalmers doctrine that a union may impose a court enforceable reasonable fine. The strikebreaker, being an employee, has certain rights under the Act as does the employer and the Union. The fine at 35 percent of earnings for work performed at regular rates for the normal work day[35] was, as pointed out, a genuine deterrence but not a total deterrence. The employee strikebreaker, albeit deterred from doing so by the 35 percent fine, could, nevertheless, work the same amount of time, at the same rate, with the same gross earnings as would have been the case but for the strike. By the same token, the employer would receive from the strikebreaker the same amount of work hours at the same pay as would have been the case but for the strike. The union's interest in defeating or minimizing the performance of work by its members during the strike is reasonably protected by the court enforceable fine of up to 35 percent of normal earnings. As pointed out previously, this fine is a genuine deterrence but not a total deterrence. As to some individuals the deterrence will prevail and they will not work. Other individuals may react differently but there is, in our opinion an equitable balance of all factors and in-

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[35]In other words, we are referring to a strikebreaker who before the strike worked 8 hours a day, 5 days a week at, for instance, $3.00 per hour. During the strike he works under the same conditions as to hours, days, and wage rate.

terests and that is our definition of the reasonable fine referred to in the cited case.

However, when the strikebreaker, instead of performing his normal amount of work at his regular rate, which would have been his right and custom but for the strike, performs overtime work in excess of 8 hours per day and 40 hours a week and works on week-ends so that he earns premium pay, a different situation exists. The strikebreaker is now profiting by the strike and is the recipient of what may be termed a windfall. He is no longer earning what he would have earned but for the strike but is affirmatively profiting by reason of the fact that his fellow union members are on strike and are obeying the union rule against strikebreaking, a rule which, of course, he is not obeying. He is no longer exercising simply the normal "right" of an employee to work as he would have worked but for the strike.

For each strikebreaker who is working at his normal rate and hours, there may be two, three, five, ten or more strikers who are not working at all. By working even at his normal rate and hours, the strikebreaker is affecting, in some degree, the efficacy of the strikers' lawful strike. But the 35 percent fine, being a genuine deterrence, is, in our view, a reasonable weapon in such situations since it will deter some, perhaps many, potential strikebreakers, but, being less than a total deterrence, it is not absolute. However, by working overtime at premium rates, the strikebreaker is materially going beyond protection of his own right to work normally and he is affirmatively performing not only his own normal work but is also performing

the work of one or two strikers. This, of course, infringes substantially on the union's interest in waging an effective strike as the representative of the employees and it infringes on the rights of the strikers whose work is being performed by the strikebreaker in addition to his own normal work. When the strikebreaker performs not simply his own normal amount of work but the work of one or two strikers he is, in a sense, cancelling the effect of the strikers' refusal to work and nullifying the effectiveness of the strikers' exercise of the right to strike. And the strikebreaker, whom we are discussing, is, of course, a member of the Union, who by performing even his own normal work during the strike, has violated the rules of his union.

The foregoing reasons, therefore, are the basis of our use of a fine of up to 80 percent of earnings at premium pay which normally would not have been earned by the strikebreaker. We believe that the higher deterrence inherent in this aspect of the strikebreaking situation, although even here less than total deterrence, is equitable and, presumptively, constitutes a reasonable fine. Let us illustrate the matter by using the same hypothetical strikebreaker whom we used previously.

Assume the strikebreaker normally works 8 hours a day, 40 hours a week, at $3 per hour. His gross pay is $120. After normal deductions he would take home $100. He is fined at the 35 percent of earnings rate or $42. His net take home pay is, therefore, $58. However, assume that in addition to his normal amount of work and pay, he worked 20 hours overtime during the week at a premium rate of $6 (to use a round number).

This increases his earnings by $120. He also works 8 hours over the week-end at $6 per hour, for an additional $48. His total earnings for work beyond his normal 40 hours is $168. Assume that after normal deductions he would have $138 left from the $168. If he was fined at the 35 percent rate on the $168, the fine would be $59. Deduct $59 from the $138 net, above, and what remains is $79. His overall take home pay for the week is, therefore, $58, plus $79, or a total of $137. His normal take home pay for his normal hours at his normal rate would have been $100 but for the strike. Because of the strike and despite a fine of 35 percent on both normal and premium earnings, he now takes home $137. Despite the fact that he worked 68 hours in order to take home $137, he is better off financially than he was before the strike and strikebreaking is clothed with a silver, if not a gold, lining.[36] It is therefore reasonably apparent that a fine of 35 percent of earnings loses any reasonable degree of deterrence when it is applied to earnings from overtime work at premium pay which the strikebreaker would not have received but for the strike.

However, if the fine is 35 percent of normal earnings and 80 percent of overtime premium earnings, the following is the situation. Assume the same earnings figures as used previously in our illustration. The strikebreaker is fined 35 percent of his normal gross earn-

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[36]The prevalence of moonlighting (holding two jobs) and the general interest of most employees in overtime work at premium pay is indicative of the fact that in our consumer oriented society, particularly in periods of a rising standard of living and inflation and the desire for luxuries that are often regarded as necessities, the amount of take home pay is a, or the, major desideration.

ings of $120. The fine is $42. After normal deductions, take home pay would have been $100, but this was reduced to $58 because of the fine. Additional gross overtime pay is $168 which, after normal deductions, would be reduced to $138. If the fine is 80 percent of overtime earnings of $168, it is $134. When this amount is deducted from the $138 take home pay, the actual take home pay from the overtime work is $4, which, when added to the $58 take home pay from normal work, results in $62 total take home pay. Since the amount of time worked overtime was 28 hours, it is evident that the 80 percent fine on overtime earnings is substantially a total deterrence to the strikebreaker working more than the normal hours that he would have worked but for the strike. For reasons previously stated, we believe that the foregoing degree of deterrence regarding overtime not normally performed by the strikebreaker is consistent with the concept of a reasonable fine.

While the guidelines or formula that we have used as a standard for determining what is a reasonable fine under Allis-Chalmers are not meant to be inflexible with regard to particular factual situations that may arise, we believe that the formula is sound. The guidelines are in terms of maximums, beyond which the fine, in our opinion, would enter the area of an unreasonable or excessive fine. The maximum limit of a fine can, of course, have a tendency to become the normal fine but not necessarily, since, in particular situations, the specific circumstances or the objective may indicate the appropriateness of a lesser fine. In any event, we believe, that the maximums are sound norms and that deviation therefrom will tip, or begin

to tip, a rather careful balance that must enter into the standard of a reasonable fine.

We therefore use, in the instant case, the standard that a fine imposed on a member by a union that is the authorized bargaining representative, and pursuant to due internal process, because the member has worked during the strike in violation of a union rule, is, presumptively, not a reasonable fine enforceable in court if the fine is: more than 35 percent of the member's earnings during the strike, if the member, in gaining such earnings, was working the same number of hours at his normal wage rate as before the strike; or, more than 80 percent of the member's earnings during the strike if the member, in gaining such earnings, was working overtime hours at premium pay, which he would not normally have done and which would not have been available to him, but for the strike.

It is also our opinion that prior to, or in the course of, strikebreaking activity by union members, the union should issue a warning to the strikebreakers not only about the possibility or the reality of a fine but should also indicate the amount or potential amount of the fine or the method of computing the fine and the possibility of court enforcement thereof. The requirement of a warning, in our opinion, is consistent with the deterrent characteristic of the union's power to impose and collect a fine, whereas, in the absence of a warning, the fine takes on more of the coloration of a reprisal. Moreover, it would appear to be more in the union's interest to deter strikebreaking from either commencing or continuing rather than to punish

after the strike. And it certainly is in the employee's interest to be reasonably apprised and warned of the definite likelihood of a fine, its potential amount, and its enforceability, if he engages in, or continues, strike-breaking activity during a particular strike.

In Allis-Chalmers, although the Court did not stress this element, the fact was that the strikebreakers had been warned during the strike that they would be, or might be, fined, and the possible extent of and the size of the fine was indicated. It is not enough that the union constitution provides that various types of conduct by members, including working during an authorized strike, are subject to or shall warrant "reprimand, fine, and/or expulsion ...." The member cannot know from this that his working during a particular strike will result in punishment (albeit it warrants punishment), or what kind of punishment, or, if there should be a punishment and if it should be a fine, he has no idea whether it might be $20, $500 or what elements would enter into the determination of the amount of the fine. He does not know whether the Union would resort to court proceedings to collect any fine. Moreover, in the instant case, the Union had never previously imposed a fine on any of its members.

It has been held that:

> Among the most important of labor standards imposed by the Act ... is that of fair dealing, which is demanded of unions in their dealings with employees. (citation omitted). The requirement of fair dealing ... is in a sense fiduciary in nature and arises out of two fac-

> tors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power in the Union with respect to the individual. *(IUE, Frigidaire Local 801 (General Motors Corp.)* v. *N.L.R.B.*, 307 F 2d 679 (C.A.D.C.)), cert. denied, 371 U.S. 936.

Another court has stated:

> At the minimum, this duty requires that the Union inform the employee of his obligations . . .*(N.L.R.B.* v. *Hotel, Motel and Club Employees' Union, Local 568, AFL-CIO (Philadelphia Sheraton Corp.)*, 320 F 2d 254 (C.A. 3).

This comprehensive power of the Union over the individual employee, mentioned in the first cited case, would certainly be an apt characterization of the situation herein, where the Union has imposed substantial fines on individuals and court enforcement thereof.

Both the Board and the Courts have held that, although a valid union security contract is found to exist whereby union membership and the payment of dues is required as a condition of employment, a union cannot cause the discharge of an employee under the contract unless the employee had been informed of his obligation and the consequences that would follow from failure to fulfill his obligation. As the Court of Appeals, Second Circuit, phrased it, "... the Board has fleshed out the statute by requiring the Union to give reason-

able notice to an employee that he will lose his job for non-payment of dues."[37]

Since the existence of the contract in the cited cases set forth the requirement for the payment of union dues as a condition of employment, it, like the union constitution in the instant case, with its description of improper conduct by members and the possible consequences, could be said to have generally informed individuals of their obligation. But this was not enough. Where an individual did not know of or was uncertain about his obligation or the amount, the Union could not simply cause his discharge for failure to abide by the contract terms. Yet the contract was more precise than the instant constitution in defining the obligation and the consequence. Under the contract the individual was required to pay dues if he wished to continue as an employee. The constitution set forth, *inter alia*, an obligation not to work but the consequences for violation were described in terms of a variety of potentialities which included, among others, reprimand, find, and/or, expulsion. Neither in the constitution nor by other means were members pre-warned that, for working during the strike at Michoud, they would be fined and, a fortiori, there was no indication given of the amount of, or the factors in, the fine. The fines and their amount did not make an appearance until after the strike.

In the court cases cited above, the action against the employees was the causing or attempting to cause

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[37] *N.L.R.B.* v. *Local 182, Teamsters*, ____ F.2d ____, 69 LRRM 2388. See also cases cited above.

their discharge for non-payment of dues under the contract. Since the Union had not informed them of their obligation, including the amount, beforehand, it could not legally attempt to cause, or cause, the discharge of such employees under the terms of the union shop contract. By the same token, in the instant case, the action against the employees was the imposition of fines in the amount of $450. There was no warning beforehand that fines would be imposed or the amount. As previously indicated, perhaps some employee members, who worked during the strike, would not have done so if warned before hand, or they might have desisted, if they had already commenced work, upon being warned that they would be fined and the approximate amount of the fine.

Accordingly, we include as a constituent element of a reasonable fine, not only the standards and formula as to the amount of the fine, previously described, but the necessity of advising members, with regard to the particular strike, that such a fine will be imposed on those who work or continue to work during the strike. Since we also believe that the approximate amount of the fine should be indicated, this aspect would be taken care of, if the standards or formula, aforedescribed, to be used in determining the amount of the fine, are mentioned. Believing, as we do, that a fine arrived at by the use of the standards or formula will be, presumptively a reasonable fine, the use of the formula should insure that the employees have not been threatened with an excessive or unreasonable fine and that the fine itself when eventually computed will not be unreasonable. We also believe that the possibility of court enforcement of the fine, if contemplated,

should be stated, so that employees may completely understand the full import of their obligations under the union rules and the consequences that a violation may entail.

Applying, therefore, the above standards, including the 35-80 percent formula for computing what is a reasonable fine, we now consider the fines of $450 in the instant case that were imposed on all strikebreakers.[38] Consistent with our view, above, that a reasonable fine entails an antecedent warning that fines will be imposed for working during the particular strike, we find the $450 fines unreasonable since all action regarding fines occurred after the instant strike. As to the amount of the fines, we regard this as simply a matter of applying the 35-80 formula to the earnings of each strikebreaker. There were approximately 145 strikebreakers. From the payroll information in the record the Examiner is unable to make a precise determination of what would be a reasonable fine in amount as to each individual but this can be done at the compliance stage.[39]

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[38]To the Examiner, the utility and the equity of employing a standard or formula to determine whether or not a fine is reasonable is now rather concretely evident. Absent such an approach what workable basis is there for reaching a conclusion about the reasonableness of a $450 fine in the instant case. What is reasonable — $20; $50; $500; $125; $200; $350; $400; $450, or some other figure, and why is one amount reasonable and another unreasonable.

[39]For instance, payroll records show regular hours worked, overtime hours and a figure under "bonus" which may indicate bonus hours. We are uncertain about the computation of overtime and bonus. Total dollar earnings under regular, overtime, and bonus are not shown.

However, as a rough illustration, we have taken, at random, two names of strikebreakers, Aragon and Bailey from the payroll records at hand. On a comparative basis, Aragon has a relatively low hourly rate, $2.50, in round numbers. Bailey has one of the highest hourly rates, $3.63. During the strike, Aragon worked 65 regular hours and the figures 8 and 4, for overtime and bonus, respectively, are shown. As indicated, we are uncertain as to the distinction between overtime and bonus or whether time and one-half or double time are paid under one but not the other or both. In any event, for illustration, we will assume a total of 12 premium hours which were paid at double time rate or $60 for Aragon. His 65 regular hours, we assume, were paid at his regular rate which would mean $162. His total earnings therefore were $222. The 35-80 formula, if applied, would mean a fine of $57 on his $162 regular earnings and a fine of $48 on premium earnings or a total fine of $105. Adopting the same approach as to Bailey, we have 75 regular hours and a total of 22 under overtime and bonus. Bailey's regular earnings would be $272 and his premium hours at double time would be $159 or total earnings of $431. Applying the 35-80 formula, the fine on regular earnings would be $95 and the fine on premium earnings would be $128 or a total fine of $223. Since other strikebreakers had different hourly rates and worked varying amounts of regular work and different or no overtime and bonus work, a varied picture will eventually appear. The indication is, however, from the admittedly imprecise data which we used in our two illustrations, that the fine of $450 on all strikebreakers was not a reasonable fine in amount in most, and possibly all, cases. But this, as indicated, can be determined pre-

cisely at the compliance stage. The $450 fine of any strikebreaker, in our opinion, which exceeds the amount of a fine under the 35-80 formula when applied to the individual's earnings, is not a reasonable fine.

The complaint alleges that the fines "in the sum of $450 each" are "unreasonable, excessive, and discriminatory." The sole reference, in the complaint, to any fine other than the $450 fines is with respect to employees who had resigned from the Union. As to that category, the complaint alleges that the fines "in the sum of $450 each or lesser amounts" are "unreasonable, excessive, and discriminatory."

The General Counsel's brief is consistent with the foregoing allegations but the brief also reveals why the General Counsel believes that the $450 fines as to everyone involved are "discriminatory" in addition to being unreasonable and excessive. It is argued that, since, in some instances, the Union reduced the $450 fines to 50 percent of earnings by the strikebreaker at Boeing during the strike, but did not do so in all instances, this was discriminatory. Thus, "This action in denying the same right to the discriminatees as afforded other employees, even though they did not appear at their union trials, is clearly discriminatory." From this, and from the allegations in the complaint, above, it can be said that, except as to employees who had resigned, fines less than $450 are not attacked by the General Counsel. Fines less than $450 are otherwise referred to only in support of the argument that the $450 fines were discriminatory, in addition to being unreasonable and excessive.

In the etymological sense the 50 percent of earnings as distinguished from $450 is discriminatory since there is a distinction or difference in treatment and amount. But, in our opinion, in itself, it is not an illegal discrimination for a union to treat differently those members who appear at their trial, repent, and pledge future loyalty, as distinguished from members who never appeared or never made a plea. All members were duly notified of their trials and all could have appeared and all would evidently have received the same treatment under similar conditions. We therefore do not find that the $450 fines were discriminatory.

For reasons previously stated at length, it is found that the fines of $450 that were imposed after the strike, without prior specific warning that they would be imposed at Michoud, and in amounts that exceeded the 35-80 standard or formula in relation to earnings, were unreasonable fines and that, under all the circumstances in this case, including court enforcement of the fines, there was a violation of Section 8(b)(1)(A) of the Act. It is our opinion that the violation was compounded in those cases of members who had resigned from the union prior to the imposition of fines. It is our opinion that resignations received by District Lodge 751 constituted valid resignations in view of the circumstances described earlier in this decision. In any event, Lodge 405 was aware of the resignations before taking action regarding fines.[40] Moreover

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[40] In some instances, the registrations were received prior to the time the employee went to work during the strike. In more instances, the resignations were deposited in the mail before the employee returned to work. All or practically all resignations were received by the Union prior to any action on the subject of fines.

since the Union took the position that a member could not resign from the Union, the resignations and the details thereof, including receipt, were futile gestures insofar as the Union was concerned, but, in our opinion, effective notwithstanding, since the intent of the resignees is clear.[41]

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[41] *Aeronautical District Lodge 751, International Association of Machinists & Aerospace Workers, AFL-CIO (The Boeing Company)*, 173 NLRB No. 71, 61 LRRM 1363.

At the conclusion of the body of his decision in the instant case, the Examiner finds, although it may be of no moment to anyone but himself, that his effort to apply and to implement the Allis-Chalmers decision and its rationale in the present case, confirms him in his respectful disagreement with the Allis-Chalmers decision regarding the meaning of Section 8(b)(1)(A) and its proviso. In our opinion, the above section of the Act reveals a congressional intent that union fines and their amount were to be a matter for the Union, including the enforcement of such internal disciplinary measures by internal means. The maximum internal sanctions preserved to the union for enforcement of its disciplinary measures, such as fines, were, we believe, denial of membership or expulsion. The rights and restrictions in the Act are applicable to all unions, the weak and the strong, the effective and the ineffective. If, for instance, one union because of its economic strength and bargaining power, in the exercise of the rights under Section 8(a)(5) of the Act, is able to secure a contract from an employer with substantial wage increases and other benefits, but, another union, lacking effective economic bargaining power, can secure no appreciable benefits in a contract with an employer, these differences do not alter the meaning or the limitations of Section 8(a)(5). Expulsion from membership or the threat thereof may be an effective disciplinary tool in some organizations and not in others, or it may be more effective in one organization than in another and may vary in different situations. In our opinion, these factors do not alter the meaning of Section 8(b)(1)(A) and its proviso as we read and understand them and their legislative history. But Allis-Chalmers is the law on the subject and it is that decision that has governed the instant decision and has involved us in the matter of what is a reasonable union fine for violation of a union rule.

Conclusions of Law

As set forth hereinabove and for the reasons hereinabove stated, it is found that, by threatening to seek, or by seeking, court enforcement of unreasonable fines imposed upon employees, who were union members, or by imposing fines or by seeking court enforcement of fines upon employees, who were former union members who had resigned from the Union, all because said employees worked during the September, 1965, strike at Boeing's Michoud plant, the Respondent Union restrained and coerced said employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, hereinabove described, it will be recommended that Respondent cease and desist from such conduct.

It will also be recommended that, with respect to any employee who had resigned from membership in the Union, who had formerly been a union member, and who was fined after his resignation, and who paid any such fines to Respondent, Respondent refund or reimburse said employee the amount of such paid fine. As to employees who had remained union members, it will be recommended that any such employee, who paid an unreasonable fine after Respondent threatened to institute, or instituted, steps for the court enforce-

ment of such unreasonable fines, be reimbursed or refunded by Respondent the said unreasonable fine. The determination of whether or not the fine was reasonable or unreasonable will be on an individual basis since, as set forth in our decision above, the earnings and types of earnings, regular or premium earnings, of the employee member, are important elements in determining whether or not the fine was reasonable pursuant to the standards or formula that we have adopted.

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, we recommend the following:

Recommended Order

Respondent, Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employee members of Respondent Union, in the exercise of their rights guaranteed in Section 7 of the Act, who worked at the Michoud plant during the September, 1965 strike, by threatening to seek, or by seeking, court enforcement of unreasonable fines imposed on said employee members.

(b) Restraining or coercing employees, who had resigned from the Respondent and who were no longer members of Respondent, in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines or by threatening to seek or by seeking court enforcement of fines when said fines were imposed because said employees had worked at the Michoud plant during the September, 1965, strike.

(c) In any like or related manner, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this recommended order, above, who have paid unreasonable fines under the circumstances described in paragraph 1(a), above, the amount of the unreasonable fine.

(b) Reimburse or refund to any employees, described in paragraph 1(b) of this Recommended Order, above, who, if any, have paid fines under the circumstances described in paragraph 1(b), above, the amount of said fine.

(c) Post at its office and meeting hall and at the Michoud, Louisiana plant of The Boeing Company, if the Company is willing, copies of the attached notice,

marked "Appendix."[42] Copies of said notice, in forms provided by the Regional Director, Region 15, of the Board, after being signed by an authorized representative, shall be posted at the aforementioned locations, in conspicuous places at said locations, including all places where notices to employees are customarily posted, and reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

(d) Notify the aforesaid Regional Director, in writing within 20 days of receipt of the Decision, what steps it has taken to comply herewith.[43]

Dated at Washington, D. C.

(Signed) RAMEY DONOVAN
Ramey Donovan
Trial Examiner

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[42]In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the word "A DECISION AND ORDER."

[43]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, with 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Form NLRB-4030a
(7-65)

TXD-737-68

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A
TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

After a trial in which all parties, the union, the Boeing Company, and the General Counsel of the National Labor Relations Board were represented by attorneys, a Trial Examiner of the Board, who heard the evidence, has found that we have violated the National Labor Relations Act in certain respects, and, in his decision, his recommended order is that we post this notice and comply with what it states.

WE WILL NOT restrain or coerce employees, members of our union, in the exercise of their rights guarnateed in Section 7 of the National Labor Relations Act, which rights include the right to engage in or to refrain from engaging in union activity, who worked at the Michoud plant during the September 1965, strike, by threatening to seek, or, by seeking, court en-

forcement of unreasonable fines imposed upon them by the Union.

WE WILL NOT restrain or coerce employees who had resigned from the Union and who, in the exercise of their rights guaranteed in Section 7 of the Act, worked at the Michoud plant during the September 1965 strike, by imposing fines or by threatening to seek or by seeking court enforcement of said fines as to such employees.

WE WILL reimburse nonmembers above mentioned for any fines they may have paid to us for working during the said strike.

WE WILL reimburse members for any unreasonable fines they may have paid to us for working during the said strike after we threatened to seek or sought court enforcement of said unreasonable fines. The standard and methods for determining whether a fine as to a particular employee is or was reasonable are set forth in the Decision of the Trial Examiner and the determination takes into consideration the earnings of the individual employee at the Michoud plant during the 1965 strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed to them in Section 7 of the National Labor Relations Act.

BOOSTER LODGE NO. 405,
INTERNATIONAL
ASSOCIATION OF
MACHINISTS AND
AEROSPACE WORKERS,
AFL-CIO

_____

(Employer)

_____

(Representative) (Title)

Dated_____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, T6024 Federal Building (Loyola) 701 Loyola Ave., New Orleans, La. 70113 (Area Code 504, Tel. No. 527-6369).